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PROTECTION OF INDIVIDUALS AND THE NATION UNDER THE SELECTIVE SERVICE ACTS OF 1917 AND 1940

CHARLES W. TAINTOR, II

A. B. BUTTS

DECLARATORY JUDGMENTS AS APPLIED TO INSURANCE BUSINESS

JOSEPH C. HUTCHESON, JR.

JURISDICTION AND VENUE OF TRANSITORY ACTIONS AGAINST NONRESIDENTS OF MISSISSIPPI

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PROTECTION OF INDIVIDUALS AND OF THE NATION UNDER THE SELECTIVE SERVICE ACTS OF 1917 AND 1940

*Charles W. Taintor, II**
A. B Butts†

In May 1917 the Congress enacted the Selective Service Act of 1917,[1] and in September 1940, the Selective Training and Service Act of 1940.[2] Inasmuch as the 1940 Act was passed at a time when many persons in this country hoped that declared war could be avoided this Act contains somewhat more protection for individuals and somewhat less for the nation. In the main, however, the underlying purposes of the two Acts are the same, and the provisions very similar. No attempt will be made in this article to analyze the Acts section by section, but attention will be directed to those provisions which have been the basis of litigation, and to those sections of the Selective Service Regulations which have been relied upon by individuals and by the nation for protection.[3]

CONSTITUTIONALITY

The Constitutionality of the 1917 Act was decided in the *Selective Draft Cases,*[4] where it was held that the power of Congress to "raise and

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[1]Act of May 18, 1917, 50 U. S. C. A. §§ 165-172, 40 STAT. 76 (as amended 40 STAT. 534, *id.* 885, *id.* 955 [Hereinafter cited as "SS Act 1917"]

[2]Act of Sept. 16, 1940, 50 U. S. C. A. (App.) §§ 78-90, 54 STAT. 885. [Hereinafter cited as "STS Act 1940"]

[3]A detailed analysis of the provisions of the STS Act 1940 will be found in Geraghty, *Judicial Protection of Individuals under the Selective Training Service Act of 1940* (1941) 36 ILL. L. REV. 310. Shorter discussions will be found in the following: Joint note of the editors of the Columbia, Harvard and Yale legal periodicals; (1940) 40 COL. L. REV. 1374, (1940) 54 HARV. L. REV. 278, (1940) 50 YALE L. J. 250; and Notes (1941) 9 GEO. WASH. L. REV. 687, (1941) 15 ST. JOHN'S L. REV. 346. An extensive annotation of cases under the SS Act 1917 appears in (1940) 129 A.L.R. 1165-1276.

[4]245 U. S. 336, 38 Sup. Ct. 159, 62 L. ed. 349, L. R. A. 1918C 361, Ann. Cas. 1918B 856 (1917).

support armies"[5] is not limited to raising armies by enlistment, nor for the purpose of executing the laws of the nation, suppressing insurrection or repelling invasion.[6] In the same decision the Act was upheld against attacks upon the ground that it comprised invalid delegations of power to State officials, and invalid delegations of legislative and judicial functions to executive and administrative officials; that it interfered with the free exercise of religion; and that it imposed improper involuntary servitude.

The most difficult attacks to meet upon a theoretical basis are those which were founded upon objections to delegation.

The delegation of power by Congress to the President was very broad, and was coupled with broad powers to redelegate some of the delegated powers.[7] The delegation of "legislative" powers included the power to "draft" eligible persons, and to "raise and maintain . . . special and technical troops as he may deem necessary";[8] and to make regulations for the draft and for the exemption of abjuring, declarant aliens;[9] and to exempt conscientious objectors, persons in various public offices and others.[10] These delegations were upheld on the ground that the Act provided sufficient standards.[11] The delegation of power to set up a system of draft boards, which exercised quasi-judicial functions, was upheld on the ground that these boards were executive, rather than judicial in nature.[12] It was said in the leading case of *United States v. Stephens,*[13] that the powers of the local and district boards "relate exclusively to the efficient raising and composition of an army, and belong to the executive branch of the government. . . . The nature and purpose of their functions rather than their discretionary character furnish the test for determining whether they belong to the executive or to the judicial department." In other cases the courts spoke of the local and district boards as "executive agencies, constituted . . . to carry out an unlimited discretion,"[14] of their determinations as "like the determination of an executive officer or of a board of inquiry in an immigration hearing."[15] The boards were also

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[5]U. S. Const. Art. I, § 8, (12).
[6]*Id.* (15).
[7]SS Act 1917, §§ 2, 4.
[8]*Id.* § 2. Parker v. Commonwealth, 6 Barr 507, 515 (Pa. 1847).
[9]*Ibid.*
[10]*Id.* § 4.
[11]Selective Draft Cases, 245 U. S. 336, 38 Sup. Ct. 159, 62 L. ed. 349, L. R. A. 1918C 361, Ann. Cas. 1918B 856 (1917); Angelus v. Sullivan, 246 ed. 54 (C. C. A. 2d, 1917).
[12]United States v. Stephens, 245 Fed. 956 (D. Del. 1917); *In re* Kitzerow, 252 Fed. 865 (E. D. Wis. 1918): *Ex parte* Platt, 253 Fed. 413 (E. D. N. Y. 1918); United States *ex rel.* Roman v. Rauch, 253 Fed. 814 (S. D. N. Y. 1918).
[13]245 Fed. 956, 964 (D. Del. 1917).
[14]See *In re* Kitzerow, 252 Fed. 865, 867 (E. D. Wis. 1918).
[15]See *Ex parte* Platt, 253 Fed. 413, 414 (E. D. N. Y. 1918).

classified as "military tribunals"[16] and, less analytically, as bodies of "administrative officers,"[17] and as "public bodies exercising quasi-judicial functions."[18]

It is quite evident that no attack on the Selective Training and Service Act of 1940, on the ground of improper delegation, will be successful. Most of the cases which have been decided simply assume the propriety of some action on the part of the selective service boards and discuss only the propriety of the particular action.[19] In *United States v. Sugar*[19a] the Conscription Act of May 18, 1917 was held to be not invalid as delegating to the President legislative or judicial powers; "such power not being conferred on him or the exemption boards, the exemptions being defined by the Act, and the power merely being to determine the facts which will render applicable exemption provisions of the statute." In *Totus v. United States,*[20] however, the members of the local boards were spoken of as officers of the Executive branch of the government; and in *United States v. Rappeport*[21] the boards were referred to as administrative bodies created by Congress to get information relative to legislative action.

Fruitless attacks on the 1940 Act have been made upon the ground that conscription in peacetime is unconstitutional. These attacks have been met directly by statements that the power to raise armies in an emergency is independent of the war powers,[22] and that, while "emergency does not create power, . . . facts which create emergencies lay foundation for the use of express powers, the exercise of which could not otherwise be justified."[23] On the other hand, Bondy, D. J., of the Federal District Court in New York expressed the opinion that, in so far as the registration provisions of the 1940 Act are concerned, ". . . Congress undoubtedly has the power to seek information through registration or otherwise in

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[16]See United States *ex rel.* Troiani v. Heyburn, 245 Fed. 360, 361 (E. D. Pa. 1917).

[17]See United States *ex rel.* Pascher v. Kinkead, 248 Fed. 141, 144 (D. N. J. 1918), *aff'd,* 250 Fed. 692 (C. C. A. 3d, 1918). See also United States *ex rel.* Cubbyluck v. Bell, 248 Fed. 995 (E. D. N. Y. 1917); *Ex parte* Romano, 251 Fed. 762, 764 (D. Mass. 1918).

[18]*See* Bonifaci v. Thompson, 252 Fed. 878 (W. D. Wash. 1917).

[19]Dick v. Tevlin, 37 F. Supp. 836 (S. D. N. Y. 1941); United States *ex rel.* Errichetti v. Baird, 39 F. Supp. 388 (E. D. N. Y. 1941); United States *ex rel.* Filomio v. Powell, 38 F. Supp. 183 (D. N. J. 1941); Application of Greenberg, 39 F. Supp. 13 (D. N. J. 1941).

[19a]243 Fed. 423 (E. D. Mich. 1917); see also Kneedler v. Lane, 45 Pa. 238 (1863) where the constitutionality of the Civil War Act was upheld; *Ex parte* Coupland, 26 Tex. 387 (1862) (Confederate states "Conscript Law" held constitutional).

[20]39 F. Supp. 7 (E. D. Wash. 1941).

[21]36 F. Supp. 915 (S. D. N. Y. 1941) *aff'd. sub. nom.* United States v. Herling, 120 F. (2d) 236 (C. C. A. 2d, 1941).

[22]*See* United States v. Cornell, 36 F. Supp. 81, 82 (D. Idaho 1940).

[23]*See* Stone v. Christensen, 36 F. Supp. 739, 743 (D. Ore. 1940).

peacetime in order to be prepared for the intelligent exercise of its power to raise armies by conscription, even if its power to conscript can be exercised only in time of war."[24] In affirming the judgment in this case the Circuit Court of Appeals of the Second Circuit said that it was unnecessary to allow a continuance for the purpose of the presentation of evidence of the existence of an emergency, since that question was irrelevant to the validity of the Act.[25] In this case the court applied itself solely to the duty to register and relied upon the separability of the various provisions of the Act;[26] and said that conscription provisions are not so inseparably interwoven with the registration provisions that they can not stand separately, and, further, that submission to registration does not waive the right to assert the invalidity of the conscription provisions if the registrant should be later conscripted.[27]

One of the courts which based their decision on the emergency doctrine was of the opinion that, while prior to the middle of the 19th century a declaration of war was necessary, formal declarations of war have fallen into disuse and

> "as declarations are merely a mode of notification, the fact of war may speak louder than words, and as war has existed for some time between certain powerful nations, and open threats are made to carry it to our shores, it would seem logical to say that Congress . . . had . . . in mind a situation which caused it to believe that an emergency existed and that it was imperative for the nation to increase its armed forces."[28]

The other court, while it refused to make an unnecessary statement with regard to the limits of power to conscript in time of peace, believed that:

> "Whether events prove that we are at war, in a state of war, or clinging to an equivocal neutrality, a failure to register man-

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[24]*See* United States v. Rappeport, 36 F. Supp. 915, 917 (S. D. N. Y. 1941).

[25]United States v. Herling, 120 (2d) 236 (C. C. A. 2d, 1941).

[26]STS Act 1940, § 14 (b): "If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

[27]United States v. Rappeport, 36 F. Supp. 915, 917 (S. D. N. Y. 1941). On the unlimited character of Federal power see the following cases cited by Ansell, *Office of The J. A. G.*, (1916) 30 HARVARD L. REV. 718: Dynes v. Hoover, 20 How. 65, 15 L. ed. 388 (U. S. 1857); *Ex parte* Milligan, 4 Wall. 2, 139, 18 L. ed. 281 (U. S. 1866); United States v. Sweeney, 157 U. S. 281, 284, 15 Sup. Ct. 608, 39 L. ed. 702 (1894); Johnson v. Sayre, 158 U. S. 109, 114, 15 Sup. Ct. 773; 39 L. ed. 914 (1894); United States v. Bainbridge, Fed. Cas. No. 14, 497 (1816); Commonwealth v. Gamble, 11 Serg. & R. 93 (Pa. 1824); United States v. Blakeney, 3 Gratt. 405 (Va. 1847).

[28]*See* United States v. Cornell, 36 F. Supp. 81, 83 (D. Idaho 1940).

power of the country would be a failure to provide for 'the common defense.' "[29]

It seems, also, that the 1940 Act is constitutional as against the other objections asserted against the 1917 Act.[30] Thus, the Act is not unconstitutional in that it: establishes a religion or interferes with the free exercise of religion;[31] compels the registration of conscientious objectors;[32] imposes involuntary servitude;[33] or violates the due process of clause.[34] In fact the 1940 Act is more completely invulnerable to attack on these grounds than was the 1917 Act. Any possible doubt based on "religious" grounds is avoided by a change in the definition of persons entitled to be assigned to service in non-combatant duties only. Under the earlier Act, such a person was defined as

"a member of any well-organized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organization."[35]

Under the 1940 Act, the definition is in terms of

"any person . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[36]

Moreover, the Act provides for two classifications of conscientious objectors: those who claim exemption from combat training and service, who are to be assigned to non-combatant service; and those who are conscientiously opposed even to such service, who are to be assigned to work of national importance under civilian direction.[37]

There may be some doubt as to the constitutionality of compelling military service from aliens who have declared their intention to become

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[29]*See* Stone v. Christensen, 36 F. Supp. 739, 743 (D. Ore. 1940).

[30]Even since the extension of the STS Act 1940 to allow the sending of drafted men to any part of the world the soldier cannot rely upon the common law right to remain within the country since it yields to a specific statutory provision. United States v. Stephens, 245 Fed. 956 (D. Del. 1917), *aff'd*, 247 U. S. 504, 38 Sup. Ct. 579, 62 L. ed. 1239 (1918).

[31]*Ibid.*

[32]United States v. McIntosh, 283 U. S. 605, 51 Sup. Ct. 570, 75 L. ed. 1302 (1931). *See* Konvitz, *The Case of the Eight Divinity Students* (1941) I Bill of Rights Review, 196.

[33]Angelus v. Sullivan, 246 Fed. 54 (C. C. A. 2d, 1917).

[34]*Ex parte* Kuweski, 251 Fed. 977 (N. D. N. Y. 1918).

[35]SS Act 1917, § 4.

[36]STS Act 1940, § 5 (g).

[37]The editors of the Columbia, Harvard and Yale legal periodicals are of the opinion that these provisions, especially the latter, represent a great advance over the 1917 Act, but that the Act is still unsatisfactory in that it does not take care of non-religious conscientious objectors. *See* Note (1940) 54 Harv. L. Rev. 278, 281-282.

citizens of the United States.[38] Under the 1917 Act this problem was not so acute, as it was therein provided that such persons might withdraw their declarations, be relieved from military service, and be forever debarred from becoming citizens of the United States.[39] This provision for virtual volunteering for service is missing from the 1940 Act.[40] According to military authorities

> "An alien friend who is domiciled—that is to say, who is a permanent resident—can be compelled to serve, for otherwise he would receive the benefits of a country's existence and government without sharing the burdens."[41]

It is to be noted, however, that, even if this constitutional doubt is well founded, it is not of serious import as the separability provisions of the Act[42] will confine it to its narrow application.

REGISTRATION

The 1917 Act declared that all male persons between the ages of eighteen and forty-five should be subject to registration, except members of the Regular Army, National Guard, Reserve Corps, Navy and Marine Corps and Reserve Forces, and diplomatic and consular representatives residing in the United States, who are not citizens of the United States.[43]

Under this Act the problems arose through failure of various persons to register at the time and place specified by Presidential Proclamation, or to register at all. Two cumulative sanctions were provided for such violations; criminal prosecution under the Act,[44] and induction after automatic registration following conviction of wilfully failing to register.[45]

Any person who registered voluntarily placed himself within the jurisdiction of the local board which then had the power to determine whether his claim that he was over the maximum age on the day of registration was sufficiently supported by evidence.[46] However, a person who registered under protest and stated his age as over the maximum on his

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[38]*See* Note (1941) 9 GEO. WASH. L. REV. 687, 689-690. An alien who has lost his right to naturalization through allowing seven years to elapse after taking out his first papers, is, nevertheless, a "declarant" alien. United States *ex rel.* Bartalini v. Mitchell, 248 Fed. 997 (E. D. N. Y. 1918).

[39]SS Act 1917, § 2.

[40]STS Act 1940, § 3 (a).

[41]*See* Note, *supra* note 38, at 689, quoting DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912-1930, p. 1.

[42]STS Act 1940, § 14 (b) (reproduced in note 26 *supra*).

[43]SS Act 1917, § 5.

[44]*Ibid.* Criminal sanctions implementing the Draft Acts will be discussed, pp. 476-81, *infra.*

[45]*Ibid.*; *Ex parte* Dunn, 250 Fed. 871 (D. Mass. 1918).

[46]Brown v. Spellman, 254 Fed. 215 (E. D. N. Y. 1918).

questionnaire was improperly put on the draft list and turned over to the military authorities under arrest, as the board had no power to compel registration.[47]

Another problem arose from the provisions of the Act and the Regulations promulgated by the President covering persons who were absent from the United States on registration day and returned later thereto. The Regulations[48] provided that such persons should register within five days of their return. One person maintained that he was thereby given five free days in which to leave the United States again and that he was denied those days because, immediately upon his return to this country through expulsion from Canada by Canadian Immigration officials for making statements derogatory to the cause of the Allies, he was arrested by the United States Marshall and kept in custody. The validity of this defense was denied upon the ground that his duty to register within five days of his return was absolute and that the Court would not inquire into the lawfulness of his deportation from Canada.[49]

A somewhat more serious difficulty arose through the requirement that all aliens, whether they had declared their intention to become citizens of the United States or not, submit to registration. In several cases an argument was made that aliens who had not so declared their intention were not subject to registration, the argument being based upon the declaration in Section 2 of the Act that "such draft as herein provided shall be based upon liability to military service of all male citizens and male persons residing in the United States, not alien enemies, who have declared their intention to become citizens . . . ." This contention was met by statements that the Act required all male persons between certain ages to register[50] and made all such persons liable to draft into the forces unless "exempted or excused therefrom,"[51] and that such exemption or excuse was not self-operating but required a claim of exemption as a condition precedent.[52] In some cases it was contended that aliens, with whose nations there existed treaties protecting them from military service, were not required to register. This contention was met in *Ex parte Larrucea*[53] by the statement that whatever "liability to military

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[47]*Ex parte* Fuston, 253 Fed. 90 (E. D. Tenn. 1918).
[48]Promulgated Nov. 18, 1917.
[49]United States v. Scott, 253 Fed. 281 (E. D. Wash. 1918).
[50]SS Act. 1917, § 5.
[51]*Ibid.*
[52]Ruthenberg v. United States, 245 U. S. 480, 38 Sup. Ct. 168, 62 L. ed. 414 (1918); Summertime v. Local Board, 248 Fed. 832 (E. D. Mich. 1917); *Ex parte* Beales, 252 Fed. 177 (S. D. Cal. 1918); *Ex parte* Blazekovic, 248 Fed. 327 (E. D. Mich. 1918).
[53]249 Fed. 981 (S. D. Cal. 1917).

service may have meant" as to judicial action the treaty was superseded by the Selective Service Act,[54] and the alien would be remitted to relief through action by the political department of his nation,[55] or to relief from actual service under the provisions of the Act.[56]

Under the 1940 Act we shall be spared argument based on a declaration that the draft is founded upon liability to military service, for such a declaration was omitted therefrom; the duty to register is stated in unequivocal terms;[57] and the liability for training and service in the military forces of the United States of "every male citizen of the United States, and every male alien residing in the United States who has declared his intention to become such a citizen . . ." is explicitly declared.[58] It seems quite clear, further, that no contention based on alienage protected by treaty will succeed, whether alleged as a defense to failure to register or as a claim to exemption, in the case of a declarant alien. No such case has been found, but the decision and opinion in *Totus v. United States*[59] make it clear that the contention will fail. In that case it was said that the so-called Stevens Treaty[60] may or may not refer to the waging of war by the Yakima Indians upon other nations and peoples,[61] but that, if it does, it was abrogated by the 1940 Act,[62] Congress having the power to supersede treaties.[63]

None of the attacks upon the 1940 Act, which have as yet reached the courts, has been effective. These have been based upon the constitutionality of the Act, which has been uniformly upheld, as discussed above, and upon the contention that the Act did not become effective until the President issued rules and regulations under Section 10 (a).[64] This contention was met by the statement that the court would take judi-

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[54]Summertime v. Local Board, 248 Fed. 832 (E. D. Mich. 1917); *Ex parte* Blazekovic, 248 Fed. 327 (E. D. Mich. 1918); United States *ex rel.* Pfefer v. Bell, 248 Fed. 997 (E. D. N. Y. 1918).

[55]Summertime v. Local Board, 248 Fed. 832 (E. D. Mich. 1917); *Ex parte* Larrucea, 249 Fed. 981 (S. D. Cal. 1917); *Ex parte* Blazekovic, 248 Fed. 327 (E. D. Mich. 1918); United States *ex rel.* Pfefer v. Bell, 248 Fed. 997 (E. D. N. Y. 1918).

[56]Summertime v. Local Board, and *Ex parte* Blazekovic, both *supra* note 55.

[57]STS Act 1940, § 2.

[58]*Id.* § 3.

[59]39 F. Supp. 7 (E. D. Wash. 1941).

[60]June 5, 1855, ratified by the United States Senate, March 8, 1859, 12 STAT. 954.

[61]The terms are: "[The] Confederated Tribes . . . will [not] make war upon any other tribe, except in self defense. . . ."

[62]STS Act 1940, § 16 (a): "Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force."

[63]Thomas v. Gray, 169 U. S. 264, 18 Sup. Ct. 342, 42 L. ed. 740 (1897).

[64]54 Stat. 893 (1940); 50 U. S. C. A. (App.) § 310 (a) (Supp. 1941).

cial notice of the issuance of such rules and regulations and that the omission of an allegation thereof was not fatal to an indictment.[65]

The Classification and Selection System

Although there are some differences between the administrative provisions with respect to the classification, selection and induction of persons who registered under the two Acts, the problems are so nearly identical that separate discussion appears unnecessary and inadvisable. It will be understood therefore, that, unless it is otherwise indicated the following material is applicable to either Act.

Under both Acts there was set up a system of administrative procedure based upon registration with the classification and selection for actual service by local boards, with a right of appeal to appellate boards. The latter were established by the 1917 Act under the name of District Boards, and by Presidential regulation under the 1940 Act as Appeal Boards,[66] with jurisdiction to affirm, modify or reverse the decions of the local boards within their territorial jurisdiction. Their decisions were declared by the 1917 Act and by the 1940 regulations to be final, except on appeal to the President in restricted situations.[67] Under both Acts the local boards are charged with the duty of deciding in the first instance the class in which a registrant shall be placed.[68]

The local boards now operating are charged with equal and fair treatment of all registrants and the avoidance of discrimination on account of race, creed, color, or membership or activity in any labor, political, religious or other organizations.[69] They are instructed to classify solely upon the basis of the questionnaire and other information in the registrant's file. The other information may be in the form of affidavit, deposition or other document, or in the form of written summary of testimony given before the board,[70] and the boards are given the power to compel testimony and the production of such papers and records as may be deemed necessary.[71] Only persons in classes IA, B, D. E, and IVE are given an opportunity to appear in person before the local board,[72] and only upon

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[65]Zuziak v. United States, 119 F. (2d) 140 (C. C. A. 9th, 1941). Proclamations Nos. 2425, 8545. The courts will also take judicial notice of all regulations and amendments thereto under the Act as they are published in the Federal Register.

[66]SS Act 1917, § 4; [1940] I Regulations, § 145.

[67]*Ibid.*

[68]SS Act 1917, § 4; [1940] III Regulations, § 322.

[69][1940] III Regulations, § 322.

[70]*Id.* § 329.

[71]*Id.* § 325.

[72]*Id.* § 367. In Local Draft Board v. Connors, 124 F. (2d) 388 (C. C. A. 9th, 1941), it was held that persons desiring deferment for reason other than their being "necessary" men in essential industries (under § 10 (a), 1940 Act) were not entitled to an oral hearing.

written request filed within five days of the mailing of the notice of classification.[73] Upon such personal appearance a registrant may appear with an interpreter if he is unable to speak English adequately, but may not be represented by an attorney; nor may he introduce new evidence not already contained in his file, unless with the consent of the board, or to support a claim of false or misleading information; and all this evidence must be in writing.[74]

When the final classification has been made, the registrant, any person who claims to be a dependent of the registrant, and various Selective Service officials, may appeal from the classification.[75] This appeal must be made in proper form,[76] and made by the registrant or a dependent within five days after the Notice of Classification is mailed to the registrant: the Selective Service officials may appeal at any time.[77] On appeal, except in the case of a claim of conscientious objection, the Appeal board may consider only the record submitted to it by the Local board, but may request the Local board to secure more evidence.[78]

From the decision of the Appeal board, an appeal may be made to the President in limited cases.[79]

In so far as any attack upon the basis of improper delegation is concerned, this system, while not perfect, is invulnerable. The important questions are whether procedure under the Regulations contains the essence of fairness necessary for constitutionality, and whether a departure from such procedure destroys the delegated authority or denies the rudiments of fair play.

The provisions for notice to registrants are sufficient, even though notice is based upon the mailing of the various papers, whether received or not.[80]

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[73]*Id.* § 368.
[74]*Id.* § 369.
[75]*Id.* § 370. Only those classes of registrants who are immediately callable may appeal after classification. Classes IB and IE, who will not be inducted until called by the land and naval forces, may appeal to a lower classification only after the call is made; and no appeal lies for a lower classification by those in classes II and III.
[76]*Id.* § 372.
[77]*Id.* § 371. The appeal on the part of the government will normally be made by the Government Appeal Agent, though appeals can be made by the National and State Directors of Selective Service.
[78]*Id.* §§ 374, 376, 387. The Appeal Board is directed to return all papers to the Local Board with its request for the securing of further evidence, and the Local Board is directed to reconsider its classification in light of the new evidence.
[79]*Id.* §§ 379-81.
[80]*Id.* § 158.

Under the 1917 Act all of the attacks on the validity of notice were made in suits for habeas corpus following arrest for desertion after failure to report for military service upon notice of induction. There were two periods, one prior to September, 1918, and the other after that date when the regulations were amended to provide for constructive service by mailing of notices to report for service.[81] In the earlier period it was held in the United States District Court of Texas and in the Fourth Circuit Court of Appeals that actual notice was necessary,[82] though proof of mailing was prima facie evidence of receipt.[83] In the Second and Ninth Circuit Court of Appeals and in the United States District Court in Kansas it was held that constructive notice was sufficient.[84] The latter decisions were based upon a doubtful construction of the Presidential intention, as shown by the regulations,[85] and upon the opinion that the exigencies of the situation required speedy action and that it must have been intended that constructive service by mailing be sufficient.[86]

In the most important of these cases, decided long after any possible influence arising from immediate urgency, there was also an irregularity in that the notice to report did not allow the full ten-day period prescribed by the regulations.

Circuit Judge Clark was of the opinion that this was a non-prejudicial irregularity for the following reasons. First: There might have been a different case if the registrant would have been able to present cogent reasons for exemption or deferred classification if he had the full ten days in which to act, but that there was no possible prejudice where Grover Cleveland Bergdoll made no attempt to communicate with his

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[81][1917] I Regulations, § 133, as amended Sept. 16, 1918.

[82]*Ex parte* Caplis, 275 Fed. 980 (W. D. Tex. 1921); Farley v. Ratcliffe, 267 Fed. 682 (C. C. A. 4th, 1920). If the notice is not mailed to the address given by the registrant in his questionnaire, if any, or in his registration papers, he does not have notice until he actually receives it. Allen v. Timm, 1 F. (2d) 155 (C. C. A. 7th, 1924); *Ex parte* Goldstein, 268 Fed. 431 (D. Mass. 1920).

[83]United States *ex rel.* Helmecke v. Rice, 281 Fed. 326 (S. D. Tex. 1922).

[84]United States *ex rel.* Bergdoll v. Drum, 107 F. (2d) 897, 129 A. L. R. 1165 (C. C. A. 2d, 1939), *cert. denied,* 310 U. S. 648, 60 Sup. Ct. 1098, 84 L. ed. 1414 (1940); United States v. McIntyre, 4 F. (2d) 823 (C. C. A. 9th, 1925); *Ex parte* Edwin Bergdoll, 274 Fed. 458 (D. Kan. 1921); U. S. *ex rel.* Feld v. Bullard, 290 Fed. 704 (C. C. A. 2d, 1923), *cert. denied,* 262 U. S. 760, 43 Sup. Ct. 706, 67 L. ed. 1220 (1923).

[85]Prior to the amendment made in Sept. 1918 (see note 81 *supra*) there was a provision for constructive notice of orders mailed by the Local Boards, but no such provision in the Regulations with respect to orders mailed by the State Adjutant Generals' offices. In United States v. McIntyre, 4 F. (2d) 823 (C. C. A. 9th, 1925), Rudkin, J., expressed the opinion that the President could not have intended to give less effect to the mailing of a notice by the Adjutant General than by a Local Board. and that he "manifestly" did not intend to favor delinquents, to whom the Adjutant General's notices went, over non-delinquent draftees.

[86]United States v. McIntyre, 4 F. (2d) 823 (C. C. A. 9th, 1925).

Local board. Second: "A clerical error should not be held able to throw the machinery of the draft out of commission where it worked no perceivable prejudice to the rights of any one." Third: In fact Bergdoll was not notified to the Adjutant General's Office as inducted and delinquent until thirteen days had elapsed. Fourth: Actual notice was not necessary under the Act.[87]

This particular problem, liability to military prosecution for desertion in failing to report when ordered, will not arise under the 1940 Act. The regulations provide for induction into the military service only after examination at the induction station for acceptability, after which: "An officer of the Army, Navy, or Marine Corps will administer a prescribed oath to each of the men. He will then inform them that they are members of the land and naval forces. . . ."[88]

It seems possible that this difference under the 1940 Act was caused by the realization that the penalty for desertion is heavy and that a court martial is likely to convict on formality,[89] and that such heavy penalty is not justified in peacetime. It is submitted that consideration of court martial practice should lead the courts to refuse to construe a requirement for notice as satisfied by constructive notice in this situation only if the terms of the requirement are explicit. It may be that, now we are at war, the danger inherent in training and service will make it necessary to amend the Regulations in such manner as again to provide for automatic induction of delinquents, and to make it impossible for Achilles to sulk in his tent. If so, the constitutionality of constructive notice is clear.

Each registrant must keep in mind the fact that the Regulations make it his duty to keep his local board advised of his mail address, and that the mailing of any notice, blank, or order to the last address reported by him

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[87]United States *ex rel.* Bergdoll v. Drum, 107 F. (2d) 897, 129 A. L. R. 1165 (C. C. A. 2d, 1939), *cert. denied,* 310 U. S. 648, 60 Sup. Ct. 1098, 84 L. ed. 1414 (1940). Clark, J. [see 129 A. L. R. at 1170], expressly approved the other cases cited in notes 83 and 84, *supra,* and disapproved *Ex parte* Caplis and Farley v. Ratcliffe, cited *supra* note 82. He said: "To require actual notice would enable a draftee to avoid military punishment simply by going into temporary seclusion or by fleeing from the draft, as here."

[88][1940] IV Regulations, § 429; Stone v. Christensen, 36 F. Supp. 739 (D. C. Ore. 1940).

[89]See, for example, Rome v. Marsh, 272 Fed. 982, 985 (D. Mass. 1920), the facts of which are set out in the text at p. 457, *infra.* Morton, J., therein said: "The insistence on the prosecution for desertion by the army authorities after the real facts have been brought to their attention seems to me far from creditable." See also *Ex parte* Beck, 245 Fed. 967 (D. C. Mont. 1917), in which the respondent in *habeas,* an army officer, attempted to defend against the writ on the ground that he would be liable to discipline if he obeyed the order of the court.

is notice of its contents.[90] Registrants who suffer through actual failure to receive such mail will, in the great majority of cases, have only themselves to thank for their suffering as the Regulations require that Registrars "shall instruct the registrant to keep in touch with his Local board and especially to report immediately any changes of address."[91]

The above regulation and the provisions for issuance of permits to leave the country,[92] make it clear that the advent of conscription did not act to immobilize registrants.

Under the regulations issued in 1940 to cover the issuance of permits to leave the country it is apparent that the decision as to whether a permit should issue is confided to the Local boards.[93] If the board does decide to issue such a permit it must be careful to give the registrant a reasonable time in which to receive notification of the requirement to perform any duty. Otherwise, he will be liable to no prosecution for failure to perform the duty. Under the 1917 Act a registrant obtained permission from the War Department to leave the country to do business in South America, his petition correctly stating his address there. Later, the Local board, acting in conformance with the existent regulations sent him by mail, addressed to his home address (this, incidentally, was the only address the Local board knew as he had left the country before the system of administration was set up), an order to appear for physical examination. He was given five days notice. When he returned to this country, he was arrested as a deserter and held for trial by the Army.

He immediately petitioned for a writ of habeas corpus, upon which he was dicharged from custody.[94] Morton, J., mentioned the facts that at the time when the notice was sent to him there were no adequate regutions covering this situation, and that this was apparently due to oversight as it was later corrected, and deduced therefrom that the Army authorities recognized that the provision for five days notice was inadequate. He was also of the opinion that

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[90][1940] I Regulations, § 158. Constructive notice is, of course, not given if the order is not mailed to the address reported to the board. *Ex parte* Goldstein, 268 Fed. 431 (D. Mass. 1920).

[91]II *Id.*, § 235.

[92]III *Id.*, § 323.

[93]*Ibid.* *See* United States *ex rel* Feld v. Bullard, 290 Fed. 704, 707 (C. C. A. 2d, 1923), *cert. denied*, 262 U. S. 760. 43 Sup. Ct. 706, 67 L. ed. 1220 (1923). The local boards are admonished to require the completion of the questionnaire and to classify the registrant if it appears necessary for proper determination of the advisability of issuing the permit.

[94]Rome v. Marsh, 272 Fed. 982 (D. Mass. 1920). *Cf.* United States *ex rel.* Feld v. Bullard, 290 Fed. 704 (C. C. A. 2d, 1923), *cert. denied*, 262 U. S. 760, 43 Sup. Ct. 706, 67 L. ed. 1220 (1923), in which it appears that the registrant failed to give any address but his home address in New Jersey.

> "The regulations under which the petitioner was defaulted, being inadequate fairly to protect the rights of registrants in his situation, were on that account unreasonable, and as to them void. The default was, in my opinion, unwarranted. . . ."[95]

FUNCTIONS OF THE LOCAL AND APPEAL BOARDS

Any discussion of the validity of the procedure of the boards in the process of classification and selection can be made only after consideration of the nature and function of such boards. It is clear that the system set up by the regulations, under the 1940 Act, and by the terms of the 1917 Act, is an *administrative* system and that the system partakes of an executive or legislative rather than a judicial character,[96] though the function of the boards is of a quasi-judicial nature.

It is also clear that the members of the boards are "officers of the United States." They are appointed by the President under the authority of a statute enacted by Congress.[97] Each member was

> "selected not merely to perform a ministerial duty, or a duty in a particular case, or as an expert or assistant, nor for his special knowledge . . . , but on the contrary he has to perform a quasi-judicial function requiring conference with his associate members and the exercise of judgment and discretion. It is true that the duration of his office was not stated at the time of his appointment, nor the emolument he was to receive, though reference to the latter is made in the rules . . . ."[98]

Board members are acting on behalf of the United States in an official function, within the meaning the provisions of the Criminal Code penalizing bribery of "any officer of the United States, . . . or, any person acting for on behalf of the United States in any official function."[99] Moreover, board members are entitled to the 60-day summons specified for officers of the United States by Section 12a of the Federal Rules.[100] They are not, however, holders of positions or offices of "trust or emolument, or regular employment, under appointment of the President of the United States" within the meaning of State Constitutions and statutes forbidding persons who hold such offices to occupy like offices in State or

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[95]Rome v. Marsh, 272 Fed. 982, 985 (D. Mass. 1920).
[96]See text, pp. 1-2 *supra*.
[97]United States v. Bordonaro, 253 Fed. 477 (W. D. N. Y. 1918); Totus v. United States, 39 F. Supp. 7 (E. D. Wash. 1941). *See* U. S. CONST. Art. II, § 2.
[98]*See* United States v. Bordonaro, 253 Fed. 477 (W. D. N. Y. 1918).
[99]*Ibid. See* 18 U. S. C. A. §§ 91, 207 (1926).
[100]Totus v. United States, 39 F. Supp. 7 (E. D. Wash. 1941).

City governments.[101] A judge who serves on a Local or District board does not hold "a judicial office under the laws of the United States, and violates no common law principle with respect to inconsistent offices."[102]

A very doubtfully proper protection of board members was given by the New Jersey Court in *Colgan v. Sullivan,*[103] wherein it was held seditious under the common law to say that the chairman of the Local board, "had his price" and "discriminated between persons of the draft age,"[104] Minturn, J., speaking for the four dissenting judges, was of the opinion that

> "criticism of public servants is essentially the right of the people, and guaranteed to them by express provisions of the Constitution. . . .[105] The effect of the majority opinion . . . is to declare as a part of our constitutional inheritance that when war intervenes the constitutional guarantees are ipso facto suspended. . . . 'Argumentum ab inconvenienti,' however, is invoked, and we are informed that liberal criticism by the people of a war and its methods of prosecution may weaken the morale of the troops at the front. If this argument be sound, it simply presents a situation which the founders foresaw and did not deem necessary to provide against."[106]

Since the boards are not judicial bodies the power of the courts to review their actions is limited. The federal courts have repeatedly held that they cannot issue *injunctions* to restrain prosecution for failure to register,[107] to restrain the boards from classifying registrants,[108] or from certifying registrants for military service,[109] or to order boasds to re-

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[101]Johnston v. Chambers, 148 Ga. 768, 98 S. E. 263, 264 (1919). Beck, J., reasoned that: "Membership of the board is in its nature temporary and transitory and purely for an emergency. . . . Under the [SS Act 1917] the President was vested with authority to call upon the 'local authorities' and officials of the state to act as members of these boards. . . . The duties which the members of these boards were called on to perform were of the most exalted character, but they were as transitory and ephemeral as they were exalted."

[102]*In re* Opinion of the Justices, 307 Mass. 613, 29 N. E. (2d) 738 (1940). It was pointed out that the possibility that a case would come before the justice from the board on which he served was remote, and that if one should come before him he would merely be disqualified; and, further, that, though his work on the board might take up considerable time, it was not to be expected that it would prevent his performing a substantial part of his judicial duties.

[103]Colgan v. Sullivan, 94 N. J. L. 201, 109 Atl. 568 (1920). This was a directed verdict in an action for malicious prosecution brought against the board member by the person who spoke the words set out in the text, *supra.*

[104]*Id.* 109 Atl. at 569.

[105]U S. Const. Art. I, § 5.

[106]Colgan v. Sullivan, 94 N. J. L. 201, 109 Atl. 568, 570-571 (1920).

[107]Stone v. Christensen, 36 F. Supp. 739 (D. Ore. 1940).

[108]Totus v. United States, 39 F. Supp. 7 (E. D. Wash. 1941).

[109]Angelus v. Sullivan, 246 Fed. 54 (C. C. A. 2d, 1917); Bonifaci v. Thompson, 252 Fed. 878 (W. D. Wash. 1917).

classify and defer a registrant,[110] or to grant a registrant the exemption to which he is entitled and to strike his name from the list of persons subject to military service.[111] *Mandamus*[112] and *prohibition*[113] have been refused, as has *certiorari*,[114] though certiorari to bring up the record in aid of habeas corpus has been granted;[115] and an action for *declaratory judgment*[116] that plaintiff need not register has been dismissed, all these denials of remedy having been made without inquiry into the merits.

Various reasons for the denial of these remedies have been given by the courts. Declaratory judgment has been refused on the ground that, under the 1940 Act the duty of registration was properly imposed; that no sufficient sum was in controversy, as reduction of plaintiff's income and loss of consortium could not be caused by registration; and that plaintiff's only danger was of criminal prosecution, wherein the validity of the Act could be as well tested as in a civil proceeding.[117]

In *Angelus v. Sullivan*[118] it was suggested by Circuit Judge Rogers that, if there is any direct remedy in the courts against improper action by draft boards, that remedy is to be found in certiorari to determine whether these bodies in their exercise of limited quasi-judicial functions have exceeded their bounds—even though the statute provides that the decisions of the inferior tribunal shall be final.[119] The cases in which certiorari to a draft board was sought, however, show that this type of review is not available. In *United States* ex rel. *Roman v. Rauch*[120] the reason for dismissal of the petition for certiorari was said to be that certiorari is ineffective to determine questions of fact as the return is taken for absolute truth, and, further, that the function of the boards in determining the citizenship of a registrant is only verbally a "judicial" function,

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[110]Petition of Soberman, 37 F. Supp. 522 (E. D. N. Y. 1941).

[111]Angelus v. Sullivan, 246 Fed. 54 (C. C. A. 2d, 1917).

[112]Brown v. Spelman, 254 Fed. 215 (E. D. N. Y. 1918); Dick v. Tevlin, 37 F. Supp. 836 (S. D. N. Y. 1941). In *Dick's* case, the dismissal was on the ground that Federal District Courts have no original jurisdiction in mandamus, which is neither an action at law nor a suit in equity. *See* DOBIE, FEDERAL PROCEDURE (1928) 35.

[113]Brown v. Spelman, 254 Fed. 215 (E. D. N. Y. 1918).

[114]Boitano v. District Board, 250 Fed. 812 (N. D. Cal. 1918); *In re* Kitzerow, 252 Fed. 865 (E. D. Wis. 1918); United States *ex rel.* Roman v. Rauch, 253 Fed. 814 (S. D. N. Y. 1918); Shimola v. Local Board, 40 F. Supp. 808 (N. D. Ohio 1941). *But cf.* Angelus v. Sullivan, 246 Fed. 54 (C. C. A. 2d, 1917).

[115]*Ex parte* McDonald, 253 Fed. 99 (E. D. Wis. 1918); *Ex parte* Platt, 253 Fed. 413 (E. D. N. Y. 1918).

[116]Stone v. Christensen, 36 F. Supp. 739 (D. Ore. 1940).

[117]*Ibid.*

[118]246 Fed. 54 (C. C. A. 2d, 1917). Boitano v. District Board, 250 Fed. 812 (N. D. Cal. 1918), in which the court examined the record to determine whether the petitioner got a fair hearing, was approved in a Note in (1918) 28 YALE L. J. 197, on the ground that it recognized the finality of the board's determination.

[119]SS Act 1917, § 4.

[120]253 Fed. 814 (S. D N. Y. 1918).

and this function is executive by its nature and by act of Congress. District Judge Geiger was even more emphatic in *In re Kitzerow*[121] where he said that he did not believe that Congress intended that the draft boards, "executive agencies, constituted . . . . to carry out an unlimited discretion," should be considered to be discharging quasi-judicial functions; and that examination of the merits on a petition for certiorari "would imperil the whole scheme, congressional and executive, in respect of the working of the Selective Service Law." Under the 1940 Act, the courts have emphasized the fact that the statute provides for no court review of acts of the Local boards,[122] and have reiterated the opinion that such acts are not judicial in nature, but pertain to the executive aspect of administrative action.[123]

Mandamus was refused under the 1917 Act on the ground that the boards were given the widest possible latitude to determine the truth and were not limited to the type of evidence available in court.[124] Under the 1940 Act mandamus was refused on the ground that Federal District Courts do not have jurisdiction in mandamus,[125] and, alternatively, that the Local Boards have the right to determine the age of registrants.[126] This is a particularly interesting case, for the reason that Leibell, D. J., expressed the opinion that the Local Board might well re-open the case to consider affidavits of the members of the registrant's family and a letter from immigration authorities which showed a consistent representation of the registrant's age in a declaration made on arrival at New York in 1921.

Under the 1917 Act an injunction was refused, in *Angelus v. Sullivan*,[127] on several grounds. The bill was dismissed on the ground that the courts had no power to review the actions of Local and District Boards. The Circuit Court of Appeals affirmed: First, on the ground that courts of equity enjoin only where a property interest is involved, and not where a purely personal interest is threatened; Secondly, on the ground that courts do not interfere by injunction to control the actions of public officers constituting inferior quasi-judicial tribunals, in matters properly pertaining to their jurisdiction; Thirdly, on the ground that the proper remedy, if any, is by way of certiorari to determine whether such a body has exceeded its limited jurisdiction; and Fourthly, the peitioner

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[121]252 Fed. 865 (E. D. Wis. 1918).
[122]Shimola v. Local Board, 40 F. Supp. 808 (N. D. Ohio 1941).
[123]Petition of Soberman, 37 F. Supp. 522 (E. D. N. Y. 1941).
[124]Brown v. Spelman, 254 Fed. 215 (E. D. N. Y. 1918).
[125]Mandamus is neither an action at law nor a suit in equity. *See* DOBIE, FEDERAL PROCEDURE (1928) 35.
[126]Dick v. Tevlin, 37 F. Supp. 836 (S. D. N. Y. 1941).
[127]246 Fed. 54 (C. C. A. 2d, 1917).

is fully protected by habeas corpus if he is unlawfully restrained of his liberty by induction into the military service, after refusal of a full and fair hearing.

It is to be noted that the first ground is untenable: even as early as 1917 it was well established that courts of equity will enjoin invasions of purely personal rights.[128] The rather doubtfully expressed opinion that certiorari might be the remedy is disposed of by the cases, discussed hereabove, denying that remedy.[129] The second and fourth grounds, however, are well taken; courts do not restrain actions of quasi-judicial bodies within their granted jurisdiction,[130] and it is clear that persons who are inducted into the military service are protected, in proper cases, by the writ of habeas corpus.[131]

The extraordinary longevity of judicial motions is manifested by the fact that the "personal interest" ground for refusal of injunction offers an alternative ground for refusal of an injunction against a draft board in *Totus v. United States,*[132] decided in 1941. The tenable grounds for such refusal, however, appear in *Petition of Soberman,*[133] decided in the same year, where it is noted that the function of the boards in classifying a registrant is purely administrative, not judicial; and in *Stone v. Christensen,*[134] where an injunction against prosecution for failure to register was refused on the ground that validity of the 1940 Act can be as well determined in a criminal prosecution as in a civic trial.[135]

It appears, thus, that the Local and Appeal Boards set up by the Selective Service Acts act as "administrative" bodies, whose functions are

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[128]This part of the opinion in Angelus v. Sullivan, 246 Fed. 54 (C. C. A. 2d, 1917), is severely criticized in Notes in (1918) 31 HARV. L. REV. 895 (where reference is made to Pound, *Interests of Personality* (1914) 28 HARV. L. REV. 343), and in (1918) 2 MINN. L. REV. 393 (where the statement that the opinion is contrary to established principles is buttressed by reference to the same article by Pound).

This ground for refusal of injunction is repeated, however, in Bonifaci v. Thompson, 252 Fed. 878 (W. D. Wash. 1917).

[129]See text, notes 120-123 *supra.*

[130]*Accord: Bonifaci v. Thompson,* 252 Fed. 878 (W. D. Wash. 1917); see *In re* Kitzerow, 252 Fed. 865, 867 (E. D. Wis. 1918); Brown v. Spelman, 254 Fed. 215 (E. D. N. Y. 1918).

[131]Most of the cases (which will be discussed below) in which review of determinations made by draft boards is sought involve petitions for habeas corpus.

The availability of this writ has been explicitly relied on as a reason for refusing other, more direct, remedies. *See* United States *ex rel.* Roman v. Rauch, 253 Fed. 814 (S. D. N. Y. 1918); Petition of Soberman, 37 F. Supp. 522 (E. D. N. Y. 1941).

[132]39 F. Supp. 7 (E. D. Wash. 1941).

[133]37 F. Supp. 522 (E. D. N. Y. 1941).

[134]36 F. Supp. 739 (D. Ore. 1940).

[135]Query, however, whether a defense of invalidity of a statute is an adequate remedy where the penalty for disobedience is criminal; and whether this would not have been perceived if the validity of the 1940 Act had been more doubtful.

primarily executive, that no type of direct review of their actions is available and that examination of their determinations will be made only through the indirect attact of petitions for habeas corpus after induction into the military service of the nation.[136]

REVIEW OF ACTIONS OF SELECTIVE SERVICE BOARDS

There have been a comparatively small number of successful attempts to override determinations of the Local and Appeal boards by the granting of petitions of habeas corpus after induction. It is clear, however, that effective review can be obtained in this manner, and that ancillary writs of certiorari to bring up the record, as distinguished from certiorari to review the action of the board (discussed above), are available.[137]

One reason for the paucity of successful petitions for habeas corpus is reflected in the statement of District Judge Dickinson in *United States* ex rel. *Troiani v. Heyburn*:[138]

> "The technical question raised is whether a writ of habeas corpus should of right issue. The real question is how far the courts should invade the domain of the military authority . . . . The national defense is an absolute necessity of our existence. . . . To whom the call [to the colors] goes out, and who is to make an answering response, are matters germane to, and indeed necessarily involved in the exercise of the war making power. Questions which necessarily arise, or must be expected to arise, must be determined in some way and by some tribunal . . . . Congress has constituted such tribunals for the war in which our people are now engaged . . . upon whom of those within the prescribed age limits, who have registered, the duty of military services has been imposed; . . . who are to be excluded from the privilege of service; . . . who are exempt from service . . . are matters of which these tribunals have jurisdiction."

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[136]Citing a number of the cases under the 1917 Act, Circuit Judge Stephens, in Local Board v. Connors, 124 Fed. 388 (C. C. A. 9th, 1941), spoke as follows:

"In selecting their approach to the solution of problems with the far-reaching effect that the decision in this appeal may have, it has often taxed the good judgment of the courts to determine whether to place their decisions upon the narrow ground of lack of the statement of facts sufficient to constitute a cause of action, assuming for the point only that the pleader's theory of the case brings it within the court's jurisdiction, or upon the broader ground that the trial court was without jurisdiction of the subject matter where both of these issues exist.

"If we take the latter course we shall necessarily decide whether or not the District Court has any jurisdiction whatever in a case arising under the Selective Service Act other than by way of habeas corpus. We think it better not to do this where as in this case the broader question has not been satisfactorily explored in argument."

[137]*Ex parte* McDonald, 253 Fed. 99 (E. D. Wis. 1918); *Ex parte* Platt, 253 Fed. 413 (E. D. N. Y. 1918).

[138]245 Fed. 360 (E. D. Pa. 1917).

Consequently, the courts refuse even to consider an attack upon the determination of the draft boards that a registrant is to be drafted in spite of his physical deficiencies,[139] a claim of alienage,[140] or a claim of conscientious objection[141]—provided that he has had fair treatment by the system of Local and District [under the 1917 Act], or Appeal [under the 1940 Act] Boards.[142]

In order to be entitled to any relief, by way of habeas corpus, the petitioner must show that the boards acted outside of their jurisdiction, or that they acted unfairly and arbitrarily. All registrants are under the jurisdiction of the system of boards, and any registrant who fails to present his claim to exemption or deferment prior to his induction into the military service is not entitled to relief after such induction,[143] unless, perhaps, his failure is chargeable to the board;[144] nor is he entitled to relief unless he has exhausted his administrative remedies;[145] nor may he fail to report when ordered to do so and rely upon unfairness as a defense to prosecution.[146] Moreover, the registrant who desires relief from a board

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[139]*In re* Traina, 248 Fed. 1004 (E. D. N. Y. 1918); De Genaro v. Johnson, 249 Fed. 504 (E. D. N. Y. 1918).

[140]United States *ex rel.* Troiani v. Heyburn, 245 Fed. 360 (E. D. Pa. 1918); United States *ex rel.* Pascher v. Kinkead, 248 Fed. 141 (D. N. J. 1918), *aff'd*, 250 Fed. 362 (C. C. A. 3d, 1918); *Ex parte* Platt, 253 Fed. 413 (E. D. N. Y. 1918).

[141]Franke v. Murray, 248 Fed. 866 (C. C. A. 8th, 1918).

[142]The Selective Service System is, however, a *system* of tribunals, and the determination of a District Board that a registrant is entitled to deferment is binding upon a Local Board. *Ex parte* McDonald, 253 Fed. 99 (E. D. Wis. 1918). In this case Geiger, J., said that Congress could not have intended to give a right of appeal to the District Boards and have left the Local Boards with power to "optionally, ignore the action of the District Board in its change of the petitioner's status."

[143]Summertime v. Local Board, 248 Fed. 832 (E. D. Mich. 1917); United States *ex rel.* Cubbyluck v. Bell, 248 Fed. 995 (E. D. N. Y. 1917); United States *ex rel.* Pascher v. Kinkead, 248 Fed. 141 (D. C. N. J. 1918), *aff'd*, 250 Fed. 692 (C. C. A. 3d, 1918); United States *ex rel.* Schwartz v. Commanding Officer, 252 Fed. 314 (D. N. J. 1918); *Ex parte* Romano, 251 Fed. 762 (D. Mass. 1918); United States *ex rel.* Filomio v. Powell, 38 F. Supp. 183 (D. N. J. 1941).

Ignorance, even excusable ignorance, of the right to exemption does not excuse failure to present a claim for exemption before induction. *Ex parte* Lamarchia, 250 Fed. 814 (D. N. J. 1918); Lehto v. Scott, 251 Fed. 767 (E. D. N. Y. 1918); *Ex parte* Tinkoff, 254 Fed. 222 (N. D. Ill. 1918), *aff'd*, 254 Fed. 225 (C. C. A., 7th, 1918); Napore v. Rowe, 256 Fed. 832 (C. C. A. 9th, 1919).

[144]See *Ex parte* Hutflis, 245 Fed. 798 (W. D. N. Y. 1917) (Local Board, by mistake, gave registrant an appeal blank, instead of a blank on which to claim exemption for alienage); *Ex parte* Kusweski, 251 Fed. 976 (N. D. N. Y. 1918) (court remarked that there was no allegation of fraudulent inducement of an answer on the questionnaire); *Ex parte* Romano, 251 Fed. 762 (D. Mass. 1918) (some person, possibly a member of the Local Board, told the registrant that he would be sent back to Italy to serve, if he did not serve here).

[145]*Ex parte* Blazekovic, 248 Fed. 327 (E. D. Mich. 1918); *see* Note (1919) 32 HARV. L. REV. 433, explaining *Ex parte* Kusweski, 251 Fed. 976 (N. D. N. Y. 1918); *Ex parte* Romano, 251 Fed. 762 (D. Mass. 1918).

[146]*Ex parte* Romano, 251 Fed. 762 (D. Mass. 1918); *Ex parte* Kusweski, 251 Fed. 976 (N. D. N. Y. 1918); *Ex parte* Kerekes, 274 Fed. 870 (E. D. Mich. 1921).

In *Ex parte* Romano, *supra*, the petitioner had been arrested as a deserter. Morton, D. J., expressed the opinion that he had been unfairly treated by his Local

must present his claim or his evidence promptly: a board is not acting arbitrarily when it refuses to consider a dilatory claim[147] or to re-open a case for new evidence.[148]

It is considered, as indicated above, that failure of the boards to act within their jurisdiction, or to act fairly, vitiates their actions. The attacks made upon actions of boards as being without their jurisdiction arose, under the 1917 Act, from their decisions in matters of claims of exemption for alienage. Even in this jurisdictional question, the courts held firmly that the ultimate determination of the fact of alienage must be made by some tribunal and that the Local board was that tribunal, subject, of course, to review by the District board. Thus, a Local board could, in effect, decide itself into jurisdiction by determining that a registrant was not a non-declarant alien, nor an enemy alien, and the courts would examine the record only to discover whether there was *any* evidence upon which the board could make a determination.[149] The power of the boards is strengthened by the proper requirement that the registrant bear the burden of showing that he is entitled to exemption.[150]

In reaching its decision that the registrant is subject to its jurisdiction the board must, however, act fairly and fails to do so where its

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Board, but refused habeas on the ground that the proceedings, while irregular, were not void.

[147]*Ex parte* Thierret, 268 Fed. 472 (C. C. A. 6th, 1920); United States *ex rel.* Koopowitz v. Finley, 245 Fed. 871 (S. D. N. Y. 1917); United States *ex rel.* Brown v. Commanding Officer, 248 Fed. 1005 (E. D. N. Y. 1918).

[148]*Ex parte* Tinkoff, 254 Fed. 222 (N. D. Ill. 1918), *aff'd*, 254 Fed. 225 (C. C. A., 7th, 1918); Arbitman v. Woodside, 258 Fed. 441 (C. C. A. 4th, 1919) *Ex parte* Kusweski, 251 Fed. 976 (N. D. N. Y. 1918); United States *ex rel.* Kotzen v. Local Board, 252 Fed. 245 (S. D. N. Y. 1918); Petition of Soberman, 37 F. Supp. 522 (E. D. N. Y. 1941); United States *ex rel.* Filomio v. Powell, 38 F. Supp. 183 (D. N. J. 1941).

In *Ex parte* Tinkoff, *supra,* it was said that with respect to a demand for rehearing by a District Board the courts are in the same position as are appellate courts in which there is an appeal from a refusal of a retrial. In *Filomio's* case, *supra,* it was said that a petition for re-opening a case by a board is like a motion for a new trial on newly discovered evidence and that, in that situation, a reviewing court will not disturb the action of the trial court in the absence of a manifest abuse of discretion.

[149]United States *ex rel.* Pascher v. Kinkead, 248 Fed. 141 (D. C. N. J. 1918), *aff'd*, 250 Fed. 692 (C. C. A. 3d, 1918).

[150]United States *ex rel.* Pascher v. Kinkead, 248 Fed. 141 (D. N. J. 1918), *aff'd*, 250 Fed. 692 (C. C. A. 3d, 1918); United States *ex rel.* Koopowitz v. Finley, 245 Fed. 871 (S. D. N. Y. 1917); United States *ex rel.* Cubbyluck v. Bell, 248 Fed. 995 (E. D. N. Y. 1917); United States *ex rel.* Kotzen v. Local Board, 252 Fed. 245 (S. D. N. Y. 1918); Ellen v. Johnson, 254 Fed. 909 (E. D. N. Y. 1918).

In *Koopowitz's* case, *supra,* it was pointed out that, if the burden of proving alienage and non-declarant status were not on the registrant, the boards would bear the burden of proving a negative which is practically impossible of proof.

refuses exemption though all the evidence before it shows alienage.[151] Moreover a board acts arbitrarily when it refuses to rely on uncontradicted affidavits of unimpeached affiants of whom the board knows nothing which would show them to be unworthy of belief;[152] and refusal of exemption on the ground that the board finds that such affidavits can be procured with ease is arbitrary.[153]

In connection with claims for exemption on grounds other than alienage, and with claims for deferment, it is apparent that there is a strong presumption of fairness on the part of the board.[154] This presumption seems to be strengthened in cases in which it appears that the registrant made inconsistent statements,[155] claimed exemption on one ground and later on another ground,[156] or delayed for a long time his attempt to get review.[157]

The statement made above, that a board's action would not be subject to successful attack if there was "any" evidence upon which the board could have decided, makes it appear that the protection accorded to persons who may be liable to the draft is to be found almost entirely in the fairness and honesty of the boards. It is apparent, however, that the statement is not literally true:[158] the courts do, in fact, show a strong tendency to examine carefully the evidence before the boards and to treat their decisions much as they would treat the verdict of a jury, though the

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[151]Arbitman v. Woodside, 258 Fed. 441 (C. C. A. 4th, 1919); *Ex parte* Beck, 245 Fed. 967 (D. Mont. 1917); *Ex parte* Cohen, 254 Fed. 711 (E. D. Va. 1918).

In *Cohen's* case, *supra,* the registrant filed precisely the affidavit required by law and the board required no other evidence. The court said [254 Fed. at 712]: "There was no dispute then as to his being a Russian subject; there is none now."

[152]Arbitman v. Woodside, 258 Fed. 441 (C. C. A. 4th, 1919).

[153]*Ibid.*

[154]Boitano v. District Board, 250 Fed. 812 (N. D. Cal. 1918); Brown v. Spelman, 254 Fed. 215 (E. D. N. Y. 1918); *Ex parte* Thierret, 268 Fed. 472 (C. C. A. 6th, 1920).

In *Boitano's* case, *supra,* the question was of exemption as a married man: the registrant had married after the passage of the 1917 Act. The board was instructed by Regulations § 72, rule V, that the purpose of the Act was not to suspend the institution of marriage and that it should scrutinize marriages made after May 18, 1917, to determine whether the primary purpose was to evade military service and to disregard such marriages "unless such is not found to be the case." The only showings in the questionnaire were the fact of marriage on June 27, 1917, that the registrant was 23 and his wife 31, and that they had an unborn child. The decision of the board that the registrant was draftable was upheld on the ground that there was no affirmative evidence that the marriage was not evasive, and on the ground that the registrant had a fair hearing and that that was all he was entitled to. This case is approved on the second ground in Note (1918) 28 YALE L. J. 197.

[155]United States *ex rel.* Kotzen v. Local Board, 252 Fed. 245 (S. D. N. Y. 1918); Ellen v. Johnson, 254 Fed. 909 (E. D. N. Y. 1918).

[156]United States *ex rel.* Pascher v. Kinkead, 248 Fed. 141 (D. N. J. 1918); *aff'd,* 250 Fed. 692 (C. C. A. 3d, 1918).

[157]*Ex parte* Blazekovic, 248 Fed. 327 (E. D. Mich. 1918).

[158]*Cf.* United States *ex rel.* Errichetti v. Baird, 39 F. Supp. 388 (E. D. N. Y. 1941), wherein it was said that it was the province of the court only to review the

weight of a determination by a draft board is probably somewhat greater than that of a jury. The technique of the courts in reviewing the decisions of boards is shown much more vividly in the cases arising under the 1940 Act, than in those under the 1917 Act. The few cases which have arisen under the present Act will, therefore, be examined in some detail.

Only one of these cases, *Application of Greenberg,*[159] resulted satisfactorily to the petitioner for habeas corpus, who maintained that his Local and Appeal Boards acted arbitrarily and capriciously, and abused the discretion committed to them.

Greenberg became engaged in December 1939, the wedding day being set for January 4, 1941, because that day was the twenty-fifth anniversary of his parents' wedding and the fiftieth anniversary of his grandparents' wedding. In his questionnaire Greenberg stated that his income from his business was $35 per week and that he had no dependents, but that he was getting married in the early part of January, and was already saving money, along with his future wife, for the opening of a home. He was notified to appear for physical examination on January 6, 1941, but was examined, at his request, on January 3. He was married on January 4, and was put in Class IA on January 7. He appealed to the Appeal Board which sustained the Local Board. After his induction he petitioned for habeas corpus.

In support of its decision the Appeal Board attempted to justify its decision on the ground that Greenberg was single when classified: the board treated the date of his physical examination as the date of classification. This contention was rejected, and it was held that he was classified on January 7. The court mentioned the fact that he was not given notice of classification as of January 3, as a fact inconsistent with the conclusion that he was classified on that earlier date.

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record in order to "determine whether or not there was sufficient evidence before the board to substantiate its findings," and that "there can be no judicial review when the investigation has been fair and the findings supported by substantial evidence"; United States *ex rel.* Broker v. Baird, 39 F. Supp. 392 (E. D. N. Y. 1941), wherein it was said that the decision of the board was supported by "substantial" evidence; and United States *ex rel.* Pasciuto v. Baird, 39 F. Supp. 411 (E. D. N. Y. 1941), wherein it was said that the board had "ample" evidence to support its decision.

Note, however that it was said in United States *ex rel.* Filomio v. Powell, 38 F. Supp. 183 (D. N. J. 1941), that "the court is not in a position to hold that the refusal of the Local Board to reclassify was without *any* foundation." (Court's italics.)

[159]39 F. Supp. 13 (D. N. J. 1941).

Moreover, the Chairman of the Appeal Board had written a letter to the Government Appeal Agent for the Local Board, in which he said:

> "With all due respect to your comment that this applicant did not marry in order to evade the draft law, we sincerely think that when a man marries during the time when he knows he is shortly to be drafted, he undertakes this step with the feeling that either his wife would be able to take care of herself or else that he can support her on previously accumulated income."

In disposing of this argument and granting the petition for habeas corpus, District Judge Forman said:

> "Manifestly, the Selective Service Act neither contemplates a disruption of domestic life nor a moratorium on marriages occurring after its enactment. Congress was careful in expressing its intent in this respect because it is provided: 'This [classification] should be accomplished so as to give fair and equal justice to all'."[160]

After adverting to the fact that there is no specific provision covering marriages after the date of the 1940 Act, nor any specific provision in the 1940 Regulations, such as there was in 1917, Judge Forman continued:

> "The present act does not create any cloud of suspicion upon marriages occurring after September 16, 1940, or even after the filing of the questionnaire, because the circumstances of a registrant on the date of classification are controlling. This liberality does not mean, however, that 'war marriages' may not be disregarded in a proper case. Herein there is not a scintilla of evidence that Greenberg was motivated by any attempt to evade service."

The opinion continued with an examination of Greenberg's hearing before the board, in which he had produced evidence supporting the facts stated above. This evidence consisted in part of printed invitations to the combined celebrations of his wedding and the wedding anniversaries of his parents and grandparents, insurance policies on the engagement ring issued as early as December 1939, correspondence such as commonly passed between engaged couples, and affidavits of persons who swore that they knew of the date of the engagement and the plans for the wedding.

The court concluded that the fact that when he was married he knew that he would report for his physical examination on the following day was immaterial, and that:

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[160] *Id.* at 16. The court quotes [1940] III Regulations, § 326.

"The Local Board and Appeal Board acted arbitrarily in their failure to conclude that petitioner was bona fide dependent upon Greenberg on the date of classification."

Greenberg's case is to be compared with two other cases in which registrants claimed deferred classification on account of marriage after September 16, 1940; *United States* ex. rel. *Errichetti v. Baird,*[161] and *United States* ex rel. *Broker v. Baird.*[162]

Errichetti filed his questionnaire on Dec. 26, 1940, claiming his mother as a dependent. On March 6 and 7, 1941, he notified the board of his change in marital status. He stated that he was married on February 23, 1941; that he maintained his own home; that his wife did not work, as she was not physically capable of earning her own living and was partially under medical care. On March 7 notice to report for physical examination was mailed to Errichetti;[163] he was examined on March 15, and was classified IA on March 17. On April 22 the Local Board reviewed the case, and a minute on the back of the questionnaire showed this entry: "New Evidence—Class IA continued—suspicious confusing statements." The Appeal Board unanimously continued the classification. On May 13 a further hearing was granted and induction was postponed in order that the wife might be X-rayed. The examining physician wrote the board that the examination showed a healed primary lesion, and that she should be examined and fluoroscoped every six months and X-rayed every year. The board and the Government Appeal Agent decided unanimously that the classification should continue IA. Errichetti was inducted into the military service.

The court examined in detail the evidence before the boards. This included statements that the registrant had been engaged since September 5, 1940; that an engagement party had been held at his home; that he said that his wife had been told by a physician that she had a spot on her lung and probably had tuberculosis; that an inquiry addressed to the physician elicited the statement that the wife did not have tuberculosis. Mentioning the fact that there was no explanation of how Errichetti's mother was to be supported after the marriage—he had claimed her as a dependent—and doubting the engagement party, considering the alleged spot on the wife's lung and the probability that she had tuberculosis, the court concluded that the boards were justified in their conclusion that this was a

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[161]39 F. Supp. 388 (E. D. N. Y. 1941).
[162]39 F. Supp. 392 (E. D. N. Y. 1941).
[163]There is no suggestion in the opinion that any suspicion arises from the fact that Errichetti notified the board of his marriage on the preceding and same day as that on which his notice to report for physical examination was mailed.

so-called "evasion marriage," saying, "The entire atmosphere surrounding this selectee's record is most suspicious." Adding to the supicion was the fact that the registrant tried hard to get the physician to make a statement that the wife could not work, but that, in spite of this pressure, the physician did not so state.

In *Broker's* case, the registrant made no claim of dependency in his questionnaire, nor did he therein state any intention to marry: the questionnaire was filed Feb. 24, 1941. He was examined physically on April 10, and classified IA. On April 14, he requested reconsideration on the ground that he planned to marry on June 1, and asserted that he had bought furniture for his new home on Jan. 6, 1940, and an engagement ring in May, 1939.

Broker was questioned by the Local Board on April 21, 1941. At that hearing he explained the making of the first payment on the furniture by his "mother-in-law" on the ground that at the time of the purchase he was not sure of his job, but that, later, the union came in. He also produced an account book of the seller of the ring on time payment. With respect to this, there was the following colloquy:

> "Q. It doesn't say that it was an engagement ring? I don't think you have much of a claim here. A. My sister and I live alone. She couldn't live alone in the apartment. She couldn't keep it up."

The next day Broker received notice of continuation of classification. On April 26, he was ordered to report for induction on May 7. On May 5, he was notified that the time for appeal had expired, but was granted a stay of induction and an extension of the time for appeal. On appeal, the decision of the Local Board was affirmed—4-0. On May 21, he requested a 60-day deferment, which was refused, and he was ordered to report for induction on June 4. On June 2, his fiancee, now his wife, appeared, exhibited a marriage license, and said that they intended to marry the next day. On June 4, Broker appeared and said that he had been married the preceding day: he was inducted on June 4.

The court was of the opinion that the decisions of the Local and Appeal Boards were supported by substantial evidence in the Case Record,[164] and that these decisions were not arbitrary. It mentioned the fact that, at no time, was any evidence given to the boards to show how the wife existed before the marriage—whether she had ever been employed before, or not. District Judge Abruzzo also expressed the opinion that

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[164]This case was decided on the Case Record as no new matter was alleged in the traverse to defendant's return to the writ.

Congress never intended, in framing the 1940 Act, that a registrant who married the day before induction should be deferred; that the registrant had a full opportunity to present any evidence he might wish to present to the boards; and that his actions indicated that he would go to any end to avoid service in the military forces.

Because of the fact that Greenberg was classified after marriage, while Errichetti and Broker were both classified before marriage; and because of the fact that the court in *Greenberg's* case made much of the date of classification, it might be supposed that Greenberg was successful in his petition for habeas corpus for that reason. This seems, however, not to be the reason.

In the first place, the courts examined the merits in both *Errichetti's* and *Broker's* cases. In the second place, District Judge Abruzzo referred specifically to *Greenberg's* case in his opinion in *Errichetti's* case, and pointed out that Greenberg was engaged to be married at the time he filed his questionnaire and so stated therein, and said: "The conclusion reached in that case is not pertinent to the matter at hand. Each case must be determined on the facts presented and the inferences to be drawn therefrom."[165]

It is possible, even probable, that no more cases concerning change of marital status effective after registration, though contemplated theretofore, will come up. It is submitted, however, that these cases constitute valuable precedents in possible future cases of change of status, particularly voluntary changes, by men who now know that they may be subject to call in the future. The special value of these precedents is to be found in the fact that they deny the propriety of the establishment of rigid standards by the boards to determine an intention to evade service.

One point made in *Broker's* case by Judge Abruzzo should be considered by all registrants who file questionnaires. He pointed out that the first notice as to the registrant's intention or desire to be married was contained in his request for reclassification. Of course, if there is an uncontemplated change of status it will be impossible to state in the questionnaire the facts supporting a request for reclassification after the change of status, but registrants who contemplate a change of status at the time they file their questionnaires should not fail to state the facts therein. It seems, as perhaps appears in both *Broker's* and *Errichetti's* cases, that it is not unjustifiable that suspicion should be engendered in the minds of the members of the boards and of the judges by a claim rest-

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[165] *See* United States *ex rel.* Errichetti, 39 F. Supp. 388, 391 (E. D. N. Y. 1941).

ing on facts existant at the time of filing the questionnaire, but first asserted after notice of classification in IA.

United States ex rel. *Pasciuto v. Baird*[166] appears to represent justifiable suspicion engendered by inconsistent and improbable statements of the registrant. Here, Pasciuto claimed five dependents in his questionnaire, but claimed only three at the hearing of the writ. He complained of pain in the spine, and that he was unable to sit down. X-ray report showed a negative diagnosis. He claimed his father, mother, and a physically handicapped brother as dependents, but produced no facts to show that his father could not work if he wished to. He asserted that he had established a business, as contractor in finishing ladies' blouses, in September, 1940, and that his function was to get the business, but the evidence showed that the business actually was operated by his mother and sister, after his induction, and supported them and the brother. Moreover, it appeared that from 1935 to 1937 he had been employed as operator of a power press cutting mica, and as stock clerk from 1938 to 1940—employment somewhat different from the finishing of ladies' clothing.

Judge Abruzzo said in this case:

> "The complete picture presented before the Local Board was not one to inspire confidence or belief in the statements made by him. Selectees should realize the great burden placed upon the local boards under the law. The statements made by the registrants or selectees should be entirely accurate and they should be held to strict accountability for each and every statement made."[167]

The other case under the 1940 Act, *United States* ex rel. *Filomio v.*

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[166] 39 F. Supp. 411 (E. D. N. Y. 1941).

[167] *Id.* at 415.

The same attitude appears in United States *ex rel.* Errichetti, 39 F. Supp. 388, 392 (E. D. N. Y. 1941), where Judge Abruzzo expresses doubt of the genuineness of the "engagement party" since the alleged fiancee was supposed to have a spot on her lung and to be, at least, threatened with tuberculosis. See text, p. 22 *supra.*

In refusing to naturalize an alien who had claimed exemption during the war, it was said that registrants who did not read and write English were bound by the answers written by their scriveners, who were their agents, even though those scriveners were more or less incompetent, generally overworked, and sometimes, somewhat callous members of the bar. *In re* Tomarchio, 269 Fed. 400, 406 (E. D. Mo. 1920). That this doctrine rests upon the same sort of suspicion is shown by the words of the court, which were: "Candidates [for naturalization], who during the war pleaded their alien status in bar to the performance of military duty, will now be found most vehement in their protestations of loyalty, and of their yearning to take up arms in defense of the country of their adoption. Fighting ceased some two years ago, and there is now no longer any danger attached to the tardy proffers of military assistance. . . . And they now state their war records as made up by their questionnaires work an injustice, due to the fact the claims made therein are inconsistent with their real mental attitude."

In United States *ex rel.* Ursitti v. Baird, 39 F. Supp. 872 (E. D. N. Y. 1941), the court seems to put weight on the fact that the Government Appeal Agent certi-

Powell,[168] evoked severe criticism by the writer of a Note in the *Illinois Law Review*.[169] This criticism was on two grounds: First, criticism of the actual decision—refusal of habeas corpus in a case in which the court was of the opinion that the original classification of the registrant was arbitrary and unfair, but refused to take any action thereon as the registrant had failed to appeal therefrom, but had requested reclassification and had appealed from the refusal to reclassify him. The court held that the petition for habeas corpus should be dismissed because the rejection by the Appeal Board of the registrant's appeal from the decision of the Local Board was correct as the Regulations contained no provision for such appeal.

While the criticism of this aspect of the case seems justified,[170] it can be discarded as moot as the Regulations now provide for an appeal from a refusal to reclassify.

The second ground of criticism was that the court did, in fact, examine the record in the light of its stated doctrine that a refusal to reclassify would not be arbitrary unless the refusal was "without *any* foundation."[171] The fear expressed by the writer of the note is that the case may have an unfortunate influence in its effect on the morale of the armed forces as it may serve as a precedent or judicial support of unjust administration of the Selective Service Act. In support of this expression of fear the writer of the note calls in witness "two later cases citing it in support of a similar result."[172] These cases are *Errichetti's* case and *Broker's* case, both of which have been set out hereinabove.[173] In order to reach a conclusion as to the magnitude of the danger feared by the writer of the note, it will be necessary to examine the treatment of *Filomio's* case in those two cases.

In *Errichetti's* case the court introduced a long quotation from *Filomio's* case,[174] the quotation including citations, made in the latter, of seventeen other cases, some of which were Selective Service Act cases, others being Immigration Cases. The most significant quoted words used by the

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fied that he had examined the original file and findings of the Appeal Board, and the affidavits presented to it; and that he noted contradictions in the affidavits which led the board to doubt the veracity of the petitioner.

[168]38 F. Supp. 183 (D. N. J. 1941).

[169]Note (1941); 36 Ill. L. Rev. 352-356.

[170]*Id.* at 354-355.

[171]United States *ex rel.* Filomio v. Powell, 38 F. Supp. 183, 190 (D. N. J. 1941). The italics are the court's.

[172]*See* Note (1941) 36 Ill. L. Rev. 352, 356 at note 22 and note 24.

[173]*Errichetti's* case is set out in the text, pp. 21-22 *supra*, and *Broker's* case at pp. 23-24 *supra*.

[174]The quotation fills two columns of the report of *Errichetti's* case. *See* 39 F. Supp. at 390-391.

court which decided *Filomio's* case were probably the following: "And so it has been uniformly held that, if there was any evidence before such [executive] officers to justify their conclusion, the courts could not disturb their findings of fact."

It is more significant, however, that this long quotation closes with a quotation of *Arbitman v. Woodside.*[175] That part of the opinion in *Filomio's* case, which is quoted in *Errichetti's* case, ends with the following paragraph:

> "Finally in *Arbitman v. Woodside,* 4 Cir., 258 Fed. 441, the court made the following comment: 'The rule is established that the action of such executive boards within the scope of their authority is final, and not subject to review, when the investigation has been fair and the finding supported by substantial evidence.' "[176]

The court deciding *Errichetti's* case then proceeded to make the following statements about his contentions:

> "The medical report was devoid of any opinion that the young lady was unable to work because of his physical condition. . . ."

> "No explanation has been made by him as to how his mother is going to be maintained, which was highly significant in view of the fact that his questionnaire indicated that she was dependent upon him."

> "The entire atmosphere surrounding this selectee's case record is most suspicious."

> "The testimony relative to an engagement party at home in September 1940 . . . was questionable, especially in view of his statement that 'She had a spot on her lung and probably had tuberculosis'."

> "It is indicative that the selectee has endeavored to have his wife's physician file a certificate to the effect that she was unable to work. In spite of the pressure used by the selectee, the doctor did not file such a report."

Such a detailed consideration of the evidence before the boards does not seem consistent with a doctrine that a decision of the Draft Boards can not be overturned if there is *any* foundation for it. The final paragraph of the opinion shows that the court does not feel that it has

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[175]258 Fed. 441 (C. C. A. 4th, 1918).

[176]*See* United States *ex rel.* Errichetti v. Baird, 39 F. Supp. 388, 391 (E. D. N. Y. 1941).

done its duty if it searches the record only for the purpose of discovering *any* foundation for the board's decision.

> "The entire matter has culminated into a situation not calculated to inspire confidence in the selectee's actions nor in his answers to the Board's questions. The selectee was given a very fair hearing. The action of the Local Board was within the scope of their authority and there was sufficient evidence before it to determine the status of the selectee. Placing the selectee in Class 1-A was just and proper. There can be no judicial review when the investigation has been *fair* and the findings supported by *substantial* evidence. The writ of habeas corpus is discharged."[177]

In *Broker's* case,[178] the other case in which the unfortunate influence of *Filomio's* case is perceived by the writer of the note in the *Illinois Law Review,* there is no direct quotation from the latter case. It is cited as:

> "authority for the holding that the act provides the decisions of the Local Boards are final on questions of fact . . . . unless it appears that the parties involved have not been afforded a full and fair hearing, or that the executive officers have acted contrary to law or have manifestly abused their discretion committed to them by the statute."[179]

This statement of the doctrine of *Filomio's* case is immediately followed by the paragraph which is reproduced in the text *supra,* at note 176. The court proceeds with its opinion of the facts in the case before it, and makes the following statements:

> "The action of the selectee herein indicates that he would go to any end to avoid military service. . . ."
>
> "After his marriage, no information was furnished to the Local Board was to whether or not the selectee's wife was ever employed before or by what means she existed prior to this ceremony."

The opinion ends with a paragraph showing the same approach as that made in *Errichetti's* case:

> "The action of the Local Board in its investigation of this selectee's case was more than fair. Every opportunity was afforded him to present any information before the Board. His case was investigated and determined fairly and impartially. Its decision was supported by substantial evidence in the Case Record. This marriage was entered into voluntarily and solely for the purpose of evading military service. The Local Board was justified in refusing to reclassify the selectee."[180]

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[177] *Id.* at 392.
[178] United States *ex rel.* Broker v. Baird, 39 F. Supp. 392 (E. D. N. Y. 1941).
[179] *Id.* at 394.
[180] *Id.* at 395.

It is submitted that the actual techniques of Judge Abruzzo in *Errichetti's* and *Broker's* cases shows that his citation and quotation from *Filomio's* case did not lead him from the correct rule, found in *Arbitman v. Woodside,* which was also cited and quoted by him in both cases; and that his technique also shows that his use of the words "substantial evidence" in both cases, demonstrates that he does not feel that it is his duty merely to find *any* foundation for the boards' decisions.

Moreover, District Judge Forman, who decided *Filomio's* case on April 10, 1941, also decided *Greenberg's* case[181] on May 26, 1941: and decided in favor of the selectee. If Judge Forman had been looking at the record only to see if there was *any* evidence to support the decisions of the Local and Appeal Boards, he would have had little difficulty in concluding that there was *some* such evidence. It appeared that Greenberg had a small, $1,000, investment in a concern which would not stop operation on his induction, and that his wife could return to her parents as, according to the finding of the Local Board, she lived with them before her marriage and could return; and, according to the statement of the Chairman of the Appeal Board, "Mrs. Greenberg did not work for a year and a half prior to her marriage and did not intend to work after that either, and therefore, we thought that we were not creating a hardship on Mrs. Greenberg."[182]

In concluding the discussion of judicial review of the actions of Selective Service Boards, we submit that the technique of the courts in those cases which have reached them under the 1940 Act shows that they will make a sincere attempt to determine whether the petitioner is entitled to relief in those cases in which it is charged that the boards did not do their duty; and, more significantly, we submit that the very paucity of cases arising under the 1940 Act which have involved contentions that the boards have acted arbitrarily—we have found only six such cases—offers eloquent testimony to the sincerity and the success of the attempts of the boards to act fairly.

Sanctions Implementing the Selective Service Acts

Criminal Sanctions

The 1917 and 1940 Act each contain a section[183] imposing criminal sanctions against persons who, being charged with performing duties under the Act or the Regulations, fail to do their duty; or who make or

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[181]Application of Greenberg, 39 F. Supp. 13 (D. N. J. 1941).
[182]*Id.* at 14.
[183]SS Act 1917; § 6; STS Act, 1940 § 11.

are party to the making of any false registration, classification, etc.; or who make any false certificate or statement as to fitness or liability for service of any person; or who otherwise evade registration or service; or who counsel, aid or abet another to evade registration or service. The 1940 Act adds interference by force or violence with the administration of the Act or Regulations, and conspiracy to interfere. The 1917 Act prescribed a penalty of imprisonment for not more than one year, or, if the violator was subject to military law, such punishment as a court martial might direct. The 1940 Act prescribes a penalty of imprisonment for not more than five years, or a fine of not more than $10,000, or both, and contains the same provision as to trial and punishment by court martial. It does, however, contain an express provision that offenses under the Act shall not be tried by court martial unless the defendant has been actually inducted, or is subject to trial by court martial under laws in force prior to the enactment of the Act.

Most of the cases in which criminal sanctions have been invoked to implement the Acts have been cases of refusal or failure to register or of evasion of service. Of the defendants in these cases only very few obtained favorable action.

One Caplis registered and shortly fled the country. Notice to report for service was mailed to him, but it was proved that he never received the notice. He was indicted for violation of the Act in the District Court in Louisiana. Upon his return to this country he was arrested by the military authorities and held as a deserter. On his petition for habeas corpus it was held that under the Regulations in effect at the time of the mailing of the notice to him, actual notice was necessary;[184] and that he was, therefore, not a deserter. It was ordered that the respondent army officer deliver the petitioner to the United States Marshal to await further orders of the court.[185] It will be noted that this partially favorable result will be reached under the 1940 Act as induction thereunder is not automatic, as it was under the 1917 Act.[186]

One Salberg escaped punishment for failing to register under the 1917 Act by appeal to the Statute of Limitations. His crime was committed, if at all, in June 1917 and the indictment was found in 1922. The

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[184]The regulations were changed in September 1918 to provide for constructive notice by mailing. With respect to this change and the provisions of the 1940 Act, see text, pp. 454-457 *supra*. See also United States *ex rel.* Helmecke v. Rice, 281 Fed. 326 (S. D. Tex. 1922). Note that if a notice is mailed to an address other than that given on registration or in the questionnaire the registrant is bound only by actual receipt of the notice. Allen v. Timm, 1 F. (2d) 155 (C. C. A. 7th, 1924).

[185]*Ex parte* Caplis, 275 Fed. 980 (S. D. Tex. 1921).

[186]See text, p. 456 *supra*.

court, finding no limitation provision in the Act itself, had recourse to the general section covering non-capital "offenses,"[187] which provides a limitation of three years. It was held, inferentially, that the offense did not involve defrauding the United States as, for that crime, there was prescribed a limitation of six years; and, expressly, that the offense was not a continued offense.[188]

Two persons, named Edwards, were convicted of failing to present themselves for registration at their permanent home and actual place of residence. The conviction was reversed on the ground that their guilt was not proved beyond a reasonable doubt. It was held that, within the meaning of Act, residence meant domicile; that, where a change of domicile is relied on, retention of domicile depends upon the absence of intention not to reside definitely in the new home; and that one may change his domicile, even though his purpose in so doing is to avoid the duty of registration and service. It was noted that some of the evidence gave rise to suspicion that the intention to leave their old homes in Oklahoma was not real, but the Circuit Court of Appeals reached the conclusion that the conviction in the District Court was based upon the presumption of continued domicile and held that presumption was outweighed by the presumption of innocence with which it clashed.[189]

To be compared with this case are *United States v. Scott*[190] and *Pass v. United States*.[191] In the former, Scott permissibly failed to register because of his absence from this country, was deported from Canada for making statements derogatory to the United States and the cause of the Allies, and was denied the right to re-emigrate by arrest by the United States Marshal. His contention that he was allowed five days in which to re-emigrate in order to escape the duty of registration was rejected, and it was held that his duty to register within five days became absolute upon his return to the United States. In *Pass's* case it was held that precinct in which a registerable person had his permanent home was his domicile, that the burden of proving change of domicile is on him who asserts such change, and that temporary absence from home to study in another state does not constitute a change of domicile.

In the other cases concerning failure to register or to report for service the defendants were convicted. An information does not fail to

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[187]19 STAT. 32 (1876), 18 U. S. C. A., § 582 (1926).
[188]United States v. Salberg, 287 Fed. 208 (N. D. Ohio 1923).
[189]Edwards v. United States, 7 F. (2d) 357 (C. C. A. 8th, 1925).
[190]253 Fed. 280 (E. D. Wash. 1918).
[191]Pass v. United States, 256 Fed. 731 (C. C. A. 9th, 1919).

state a crime under the Act, where there is wanting an allegation that the defendant is a citizen of the United States, as aliens are compelled to register.[192] An indictment properly alleges that the accused is not within the exempted classes where it states that he was not an officer or enlisted man of the Regular Army, Navy, National Guard, or Naval Militia, in the service of the United States, and that "he was not in any manner exempted or excused from registering under the terms of the aforesaid act of Congress."[193]

An indictment charging that the accused wilfully failed to perform a duty required by the act in that he failed to exhibit his registration certificate when called upon to do so by a police officer is good against a contention that the Vth Amendment to the Constitution was violated in that the provisions of the Act compelled the accused to be a witness against himself.[194] The court analogized to the provisions of the Internal Revenue Act[195] which required that persons subject to a special tax keep conspicuously in their places of business all stamps denoting payment of the tax. Notaries who make false notarial statements that certain doctors personally acknowledged before them certificates to be used in obtaining exemption, are guilty of an offense under the Act,[196] as are registrants who make false statements as to their income,[197] or as to the dependency of a claimed dependent.[198] Moreover, registrants who make such false statements are guilty of perjury under the Criminal Code.[199] A person who, by false statements as to his property, income, and dependents, succeeds in obtaining exemption is guilty of evading the requirements of Act.[200]

A registrant who did not fill in blanks provided for claim of exemption and signed his name at the bottom of the page, but wrote across the face of the sheet: "I hereby claim exemption given me under the Constitution of the United States from any and all military service, except for the purpose of executing the laws of the Union, suppress insurrection and repel invasion" committed an offense against the Act.[201] In affirming the conviction the Circuit Court of Appeals said:

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[192]Brown v. United States, 257 Fed. 703 (C. C. A. 9th, 1919).

[193]Breitmayer v. United States, 249 Fed. 928 (C. C. A. 6th, 1918); Sugar v. United States, 252 Fed. 74 (C. C. A. 6th, 1918).

[194]United States v. Olson, 253 Fed. 233 (W. D. Wash. 1917).

[195]19 STAT. 248 (1876).

[196]United States v. Blakeman, 251 Fed. 306 (N. D. N. Y. 1918).

[197]United States v. Miller, 249 Fed. 985 (S. D. Fla. 1918).

[198]Kreibich v. United States, 261 Fed. 168 (C. C. A. 8th, 1919).

[199]United States v. Miller, 249 Fed. 985 (S. D. Fla. 1918); Whiteside v. United States, 257 Fed. 509 (C. C. A. 9th, 1919). *See* 18 U. S. C. A. § 231 (1926) (Cr. Code § 125).

[200]United States v. Miller, 249 Fed. 985 (S. D. Fla. 1918).

[201]Uhl v. United States, 263 Fed. 79 (C. C. A. 5th, 1920), *cert. denied*, 253 U. S. 491, 40 Sup. Ct. 584, 64 L. ed. 1028 (1920).

> "Plaintiff in error claimed an exemption. He indicated no purpose to waive any exemption. . . . His whole purpose manifestly was to ignore such claims of exemption and deferred classification as the rules prescribed, and to assert a claim of exemption not recognized by the rules, and which had no foundation in fact."[202]

Circuit Judge Foster dissented without opinion, but is to be hoped that his dissent was based upon the consideration that the proper treatment of the appellant would have been to disregard his claim to exemption on the ground that he had failed to make a proper claim.[203]

He who gives money to a member of a local board for the purpose of obtaining exemption or deferment is guilty of the crime of bribery under Criminal Code, Section 39,[204] and is properly indicted for "giving money to an officer of the United States for the purpose of influencing his decision or action on a question brought before him in his official capacity."[205] If the member or members of a draft board accede to the attempt to influence them, they, and the registrant, are guilty of conspiracy to violate the provisions of the Selective Service Act under Criminal Code, Section 37.[206] Other prosecutions under this section have been made successfully for conspiring "to counsel, command and induce large numbers of persons subject to registration not to register and to procure such persons to commit the offense of wilfully and unlawfully failing to register;"[207] for conspiring "to aid, abet and procure persons to violate" the Selective Service Act;[208] for conspiring "to obtain the discharge of" a registrant from the Act "by making and filing a false and fictitious claim for exemption;"[209] for conspiring to aid soldiers in the service of the United States to desert;[210] and for conspiring to resist forcibly the authorities of the United States in raising an army by conscription.[211] It appears, however, that a conspiracy to dissuade persons from registering by the print-

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[202] *Id.* at 80.

[203] This was the treatment accorded to other registrants who failed to claim exemption in the proper manner. See the denial of petitions of habeas corpus to Carlson and Zozaski. *Ex parte* Tinkoff, 254 Fed. 222 (N. D. Ill. 1918), *aff'd,* 254 Fed. 225 (C. C. A. 8th, 1918).

[204] 35 STAT. 1096 (1909), 18 U. S. C. A. § 91 (1926).

[205] United States v. Bordonaro, 253 Fed. 477 (W. D. N. Y. 1918).

[206] 21 STAT. 4 (1879), 18 U. S. C. A. § 88 (1926); *See* Gruher v. United States, 255 Fed. 474 (C. C. A. 2d, 1918).

[207] United States v. Galleanni, 245 Fed. 977 (D. Mass. 1917); Fraina v. United States, 255 Fed. 28 (C. C. A. 2d, 1918).

[208] Sugar v. United States, 252 Fed. 79 (C. C. A. 6th, 1918).

[209] United States v. McHugh, 253 Fed. 224 (W. D. Wash. 1917).

[210] United States v. Bergdoll, 272 Fed. 498 (E. D. Pa. 1921).

[211] Bryant v. United States, 257 Fed. 378 (C. C. A. 5th, 1919). This is a crime under STS Act 1940, § 11, 54 STAT. 894 (1940), 50 U. S. C. A. (App.) § 311 (Supp. 1941).

ing and circulation of handbills and circulars is not a conspiracy to "defraud" the United States under this section.[212] In 1919 the Circuit Court of Appeals for the Fourth Circuit held that this was conspiracy to defraud the United States by obstructing a function of the government,[213] but the Supreme Court, in 1924, held that such activities did not constitute "fraud," within the meaning of this section, as they do not include deprivation by trick, chicane or overreaching.[214]

It has also been held that a conspiracy, formed before the enactment of the Selective Service Act, is punishable, unless abandoned before the Act takes effect.[215]

Wilfully obstructing enlistment service of the United States is an offense under the Espionage Act,[216] and it is unnecessary to show that any person was prevented from enlisting.[217]

Other Sanctions

The Regulations promulgated under both the 1917 and 1940 Acts provide for secrecy of certain of the records of the boards. This secrecy is held to persist, apparently forever, as a privilege of the registrant,[218] or as a privilege of the affiant against the registrant.[219] Thus, where a husband sues his wife for divorce on the ground of extreme cruelty in that she made an affidavit to his local board, causing him to be inducted into the service, he cannot compel the Adjutant General to produce the affidavit. The trial court was of the opinion that the privilege was the registrant's, and that no public danger was to be apprehended as the existence of the affidavit, the maker and the contents thereof were, in fact known. The appellate court reversed on the ground that complete knowledge was necessary to the boards, that only secrecy would enable the boards to get all the information they might need, and that

> "As long as she refuses to waive the privilege, a protection thrown around her by the regulations, . . . the Adjutant General

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[212]21 STAT. 4 (1879), 18 U. S. C. A. § 88 (1926).

[213]Firth v. United States, 253 Fed. 36 (C. C. A. 4th, 1918); *semble,* United States v. Galleanni, 245 Fed. 977 (D. Mass. 1917).

[214]Hammerschmidt v. United States, 265 U. S. 182, 44 Sup. Ct. 511, 68 L. ed. 968 (1924).

[215]Bryant v. United States, 257 Fed. 378 (C. C. A. 5th, 1919).

[216]40 STAT. 219 (1917), 50 U. S. C. A. § 33 (1926).

[217]O'Hare v. United States, 253 Fed. 538 (C. C. A. 8th, 1918).

[218]Federal Life Ins. Co. v. Holod, 30 F. Supp. 713 (M. D. Pa. 1940) (motion for order directing the defendant to consent to inspection of World War Draft records, and to authorize the War Department to furnish copies of said records, overruled on the ground that these records are privileged within the meaning of the Rules of Civil Procedure, Rule 34m).

[219]Harris v. Walch, 277 Fed. 569 (App. D. C. 1922).

as custodian of the affidavit, cannot be compelled to produce it in court to be used to her disadvantage."[220]

The 1917 Act contained an express provision for relief of declarant aliens of friendly and neutral nations from liability to military service through their withdrawal of their declarations of intention to become citizens of the United States, and provided, further, that such withdrawal should forever bar their naturalization. It was further provided that only declarant aliens should be liable to military service. The 1940 Act does not provide for withdrawal of intention to become citizens, but does provide that only declarant aliens are liable to service. It is to be supposed that non-declarant aliens who assert their alienage as grounds for exemption will be later refused naturalization as was done in like case under the 1917 Act.[221]

After World War I bonuses were given by the States to their citizens who had served in the armed forces. Some of these were denied to persons who attempted to evade the draft. In Minnesota it was held, however, that the attempt must have been a true attempt to evade, and that marriage after registration plus an indication in the questionnaire that the registrant claimed allocation to a deferred class did not constitute an attempt to evade service, where the registrant did not object to classification in class 1A, nor to induction without a hearing.[222] It was said that, even if the marriage had been made for the purpose of evasion, there would have been no attempt to evade in such a case,—where no attempt to press the claim for deferment was made.

As is natural and proper, lawyers are held to a high standard of patriotism. Mere conviction of violating the Selective Service Act is ground for disbarment.[223] Moreover, active participation in and encouragement of an organization formed to nullify the Act, though no prosecution be had, is sufficient proof of such disregard for the law, which the lawyer takes his oath to uphold, to justify disbarment.[224] It seems that the following type of statements, if made by a mature lawyer after the declaration of war, are sufficient ground for disbarment. One Sullivan said: "Any time my country gets me to fight for it, it has got to force me." He also expressed the opinion that the United States had no cause for war; that, if his friends felt as he did none of them would be at the battle front; and generally attempted to justify's Germany's acts of ag-

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[220] *Id.* at 573.
[221] *In re* Tomarchio, 269 Fed. 400 (E. D. Mo. 1920).
[222] *In re* Hunt, Hunt v. Soldiers' Bonus Board, 151 Minn. 45, 185 N. W. 943 (1921).
[223] *In re Margolis,* 269 Pa. 206, 112 Atl. 478, 12 L. R. A. 1186 (1921).
[224] *Ibid.*

gression, regardless of their effect on this country. In response to an inquiry as to why he did not volunteer, he replied: "Any time they want me they will have to come and get me." In *Sullivan's Case*[225] the court suspended his license from May, 1920 to Jan. 1, 1921, at which time he might be reinstated "upon a satisfactory showing that he is a man of good character and worthy of the respect and confidence of his fellowmen." It was said that his youth, inexperience and immaturity of mind offered something in mitigation, if not in excuse, of his conduct.

While a lawyer may recover a reasonable fee for preparing and presenting a claim to exemption from service,[226] it is improper, and ground for discipline, for a lawyer who is a member of the legal advisory board in the Selective Service system to make such a charge.[227] It was found in mitigation that the lawyer showed contrition, aside from the chagrin caused by detection and its consequences; that he returned the fee as soon as the proceeding was begun against him; and that he had a long record, unmarred by any departure from professional integrity.

Solicitation of employment in claiming exemptions and the filing of false claims show sufficient moral turpitude to afford ground for disbarment,[228] as do wilful attempts to obstruct recruiting and enlistment,[229] and, *a fortiori,* conviction of aiding another to avoid registration.[230]

In view of the provisions of the Regulations under the Selective Service Act calling on attorneys to volunteer as associate members of Legal Advisory Boards, a lawyer who systematically engages in the practise of preparing questionnaires, charging for such service and refusing to assist those who have no claims for exemption, should be disbarred.[231] Such a man "became the advocate, and not the disinterested advisor, of the slacker and of men who were even willing to renounce their intentions to become American citizens—men whom he himself called sneaks."[232]

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[225] *In re* Sullivan, 57 Mont. 592, 189 Pac. 770 (1920).

[226] Spaulding v. Lambros, 58 Mont. 536, 193 Pac. 565 (1929); *In re* Arctander, 110 Wash. 296, 188 Pac. 380 (1920).

[227] *In re* O'Reilly, 188 App. Div. 970, 176 N. Y. Supp. 781 (1919). The court said: "The services would have justified some charge by an attorney, but the offending was charge and acceptance of a fee for work that was in the line of the respondent's official duties. . . . We cannot overlook the unethical course which perverted apparent patriotism to personal profit."

[228] *In re Wiltse,* 109 Wash. 261, 186 Pac. 848 (1920).

[229] *In re* Kerl, 32 Idaho 737, 188 Pac. 40, 8 A. L. R. 1259 (1920).

[230] *In re* Hofstede, 31 Idaho 448, 173 Pac. 1087 (1918).

[231] *In re* Arctander, 110 Wash. 296, 188 Pac. 380 (1920).

[232] *Id.,* 188 Pac. at 383. Arctander's conduct was said to be unethical under Code of Ethics, American Bar Association, Canon 32: "But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and a patriotic and loyal citizen."

Conclusion

The balance between the personal interests of men who are subject to Selective Service and the public interest in the successful prosecution of World War I was well and fairly maintained by the provisions of the Selective Service Act of 1917 and the Regulations promulgated thereunder, by the courts, in those cases in which the Boards made mistakes, and by the boards in the tremendous majority of cases.

Experience under the 1940 Selective Training and Service Act shows that the provisions of the Act, the Regulations controlling its administration, the courts, in the very few cases in which boards have erred, and, most especially, the boards themselves, protect those entitled to protection. The great majority of the cases under the 1917 Act arose in 1917 and 1918. At this time, April 1942, less than a dozen cases have arisen under the 1940 Act. We can say of the Boards administering the 1940 Act, even more surely than Circuit Judge Woods of the Fourth Circuit could say it of the 1917 Boards,[233] that the few cases in which the courts find it necessary to overrule the actions of the Boards contain no reflection on the character of the Boards, and that it is wonderful that they make so few mistakes.

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[233] *See* Arbitman v. Woodside, 258 Fed. 441 (C. C. A. 4th, 1919).

DECLARATORY JUDGMENTS AS APPLIED TO INSURANCE BUSINESS*

Joseph C. Hutcheson†

There are at least two exhaustive treatises,[1] a rather long and well annotated textbook article,[2] numberless annotations,[3] law review articles and notes[4] on the nature, the authority for, and the operation in state and federal courts of declaratory judgment procedure. For this reason, I shall not enter into any detailed discussion of such procedure but shall content myself on that score with some very general remarks. There is no declaratory judgment statute in Texas, none in Mississippi, and at least in Texas it is held that declaratory suits may not be maintained.[5] The decisions of the courts of other states, under their declaratory judgment acts, are not, of course, of prime interest to Texas lawyers, for whom this address was written, or to Mississippi lawyers, for whom it is being published. I shall therefore, with only a brief digression to state some general principles, direct what I have to say to a discussion of the federal declaratory judgment act with particular reference to: the types and incidents of declaratory insurance litigation in the federal courts; the question of the part discretion plays in administering the remedy there; and the much mooted and debated question of the staying of other suits and actions, pending the decision of the declaratory judgment suit.

In speaking before the conference of federal judges at New Orleans, Louisiana, May 22, 23, 1939, on the Federal Declaratory Judgment Act, I had occasion to say:

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*An address before the Insurance Section of the Texas State Bar Association, July, 1941.

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[1]BORCHARD, DECLARATORY JUDGMENTS (2d ed. 1941); ANDERSON, DECLARATORY JUDGMENTS (1940).

[2]*See* 16 AM. JUR., DECLARATORY JUDGMENTS 273.

[3]Notes (1921) 15 A. L. R. 50, (1930) 68 A. L. R. 122, (1933) 87 A. L. R. 1201, (1938) 114 A. L. R. 1362, (1939) 123 A. L. R. 286.

[4]The most important of these are: Appleman, *Automobile Insurance and the Declaratory Judgment* (1937) 23 A. B. A. J. 553; Appleman, *Federal Declaratory Judgments on Automobile Insurance,* 1939 WIS. L. REV. 496; Appleman, *Jurisdictional Conflicts in Declaratory Judgment Actions* (1940) 29 KY. L. J. 48; Borchard, *Recent Developments in Declaratory Relief* (1936) 10 TEMP. L. Q. 233; Borchard, *Declaratory Judgments and Insurance Litigation* (1939) 34 ILL. L. REV. 245 (an address delivered before the Insurance Section of the 1938 American Bar Association Convention); Borchard, *Declaratory Judgments* (1939) 62 N. Y. STATE BAR ASS'N REP. 533; Morrison, *Availability of the Federal Declaratory Judgments Act for Life Insurance Cases* (1937) 23 A. B. A. J. 788; Notes (1936) 46 YALE L. J. 286, (1938) 26 GEO. L. J. 988; (1937) 24 VA. L. REV. 195, (1937) 37 COL. L. REV. 1006, (1938) 36 MICH. L. REV. 499, (1938) 23 IOWA L. REV. 428, (1939) 52 HARV. L. REV. 527, (1940) 28 CALIF. L. REV. 638.

[5]Cheney v. Norton, 126 S. W. (2d) 1011 (Tex. Civ. App. 1939).

> "The Federal Declaratory Judgment Act has introduced a procedural reform most far-reaching in its consequences. It, along with the provisions in the new rules for pre-trial procedure, for summary judgment, for the admission of facts and documents, for deposition discovery, has done more to convert a law suit in the Federal Court from a trial by battle to a peaceable and scientific settlement of rights than anything else done in many years. Not at all new in its general theory, closely related in theory to the equitable jurisdiction in practice of long standing in England, it is, though of recent standing in the United States, not of such recent standing as to be without its commentators, its explainers and its promoters. Borchard, in his great work on declaratory judgment, made the way plain for judges who really wished to give the act effect, and most of them have so completely recognized and given effect to its spirit, that within the five short years it has been in existence, it has more than demonstrated its usefulness, while the ingenuity of the bar and the craftsmanship of the judges is making it ever more completely available. Though it already stands now as an established and available tool with its general workability well understood, its usefulness established, every volume of the Federal Reporter and Supplement contains additions to the cases on the subject, and the articles in legal reviews and periodicals are legion."

First, some general principles.[6] The action lies generally when there is a justiciable controversy, where, in short, a claim of right is asserted against one who has an interest in contesting it and there is a legal uncertainty or claimed uncertainty as to where the right lies. The controversy must be a real one between persons whose interests are really adverse. The party seeking declaratory relief must have a legally protectable interest in the controversy, and the issue involved must be ripe for judicial determination. The uncertainty necessary to move the court to action in declaratory judgments, is an uncertainty as to law and not an uncertainty as to fact. This, of course, does not mean that a question of fact will not be determined in a declaratory action, though it is generally held that declaratory actions should be confined to simple facts or to an interpretation of contracts or other instruments.

It means that a fact determination is not an end in itself but a means to an end, that end, legal obligation or lack of obligation. Thus, it has been held that in connection with a claim of defamation a court will not, independently of a claim for damages, make a purely declaratory finding as to the truth or falsity of the charge.

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[6]ANDERSON, DECLARATORY JUDGMENTS (1940) §§ 42 *et seq.* See also 16 AM. JUR., DECLARATORY JUDGMENTS 273.

Generally the action is not maintainable, (1) where it would serve no useful purpose; (2) where a special tribunal has been provided to handle specified controversies and a declaration of rights is sought as to matters falling within such specification; (3) where facts sought to be litigated are hypothetical and present only a moot case; (4) where the persons raising the questions, or the persons against whom they are raised (for a contradictor is as necessary as an affirmer), do not have a bona fide interest in them and the decision thereof; (5) and, of course, in federal tax cases, under the federal statute.

In a proceeding for a declaration of rights, the court will not, any more than it will in ordinary coercive action, decide rights in anticipation of an event which may not happen. It will, as in such actions, wait until the event actually takes place, or at least until its taking place is reasonably imminent and certain.

Often in declaratory judgments cases as in other cases, where two courts are asserting jurisdiction, a question of prime importance is, whether the exclusive power of one of them is being interfered with. But it is generally held that a declaratory judgment action is one in personam and as such, it may normally proceed though a suit on the same matter is pending in another tribunal.[7] The action is not a substitute for; it does not supplant but, supplements existing remedies. A mere difference of opinion as to the correct answer to abstract legal questions is not sufficient to warrant the action. The procedure cannot be invoked for the determination of procedural rules or rights, or even for the mere declaration of particular substantive rights, involved in a pending suit, because these questions as mere questions, are a part of a complete action and should be determined by the court in which the action is filed.

Therefore, an action will not lie to determine the admissibility of evidence, or the nature and sufficiency of a pleading, or of defences made or proposed to be made in a pending or prospective action.

Interesting questions,[8] other than those arising in insurance suits, have of course arisen and been decided under the Federal Declaratory Judgment Act in this and in other circuits, which have given character and direction to a liberal construction of it. But I believe it to be true generally—I know it to be true in this circuit—that controversies arising

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[7]Carpenter v. Edmonson, 92 F. (2d) 985 (C. C. A. 5th, 1937).

[8]Currin v. Wallace, 306 U. S. 1, 59 Sup. Ct. 379, 83 L. ed. 441 (1938); Gully v. Interstate Natural Gas Co., 82 F. (2d) 145 (C. C. A. 5th, 1936); Davis v. American Foundry Co., 94 F (2d) 441 (C. C. A. 7th, 1938); Mississippi Power & Light Co. v. City of Jackson, 116 F. (2d) 924 (C. C. A. 5th, 1941).

out of or connected with insurance contracts have been most provocative of and have furnished by far the larger portion of such suits.

An excellent note in the *Yale Law Journal,* entitled, "The Declaratory Judgment and the Insurance Contract,"[9] begins: "The declaratory judgment, a remedy singularly well adapted to controversies arising from the insurance contract, has been invoked with increasing frequency in insurance cases. . . . A survey of the many situations in which declaratory relief has been invoked indicates the utility of this procedure in the field of insurance." It concludes:

> "The recently increased case experience of the declaratory judgment in the United States is rapidly giving the device a juristic content of its own, different, both from the anticipatory definitions of its proponents and from its character in English and Dominion law. As one can see in the insurance cases, limitations which will restrict its availability to cases satisfying certain structural criteria are slowly taking shape. While it is still too soon in the history of declaratory relief to reduce such limitations to formula, they seem to be concerned mainly with two problems: how far need a controversy proceed toward conflict between the parties before it is proper for courts to grant declaratory relief? And, of what importance is it in deciding on the availability of a declaratory judgment that other remedies are available in the particular case?"[10]

Most of the other articles cited in the notes to this paper deal with these and other aspects of declaratory insurance litigation, and a large part of the textbooks and of the annotations cited, is also concerned with insurance questions. For the problems, in connection with, and the development and use of, this procedural device elsewhere than in the Fifth Circuit, I refer my readers to those sources.

Turning from them and from the decisions of federal courts in general, to deal with federal declaratory judgment procedure from the standpoint of our own circuit, I think I may say, with some conviction, that in showing a spirit of hospitality toward the new procedure, in adapting and expanding its use, in short, in making it the useful procedural tool it was designed to be, this circuit has done its part.

At a time when there was considerable skepticism toward the procedure and some of the courts were giving it grudging allegiance, keeping the promise to the ear while breaking it to the hope, finding this reason and that for refusing to apply the act, this circuit took up the burden and

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[9]Note (1936) 46 YALE L. J. 286.
[10]*Id.* at 298.

carried the torch. When the Eighth Circuit was putting forth the doctrine that the Declaratory Judgment Act could not be used to determine the existence *vel non* of a liability as distinguished from a right,[11] this circuit, in the Southern District of Texas through Judge Kennerly,[12] and in the Southern District of Mississippi, through Judge Holmes,[13] was putting forth a different sort of district court doctrine, while the circuit court, on the appeal of the Mississippi case,[14] by a generous approach to the act, was preparing ground for the full and complete use of the remedy—ground which in another case from Mississippi[15] it was to break more fully.

It is true enough that because of the failure on our part to make clear the ground of and expressly to correlate *Central Surety & Ins. Co. v. Caswell,*[16] and *Carpenter v. Edmonson,*[17] two of our decisions handed down at about the same time, the trumpet of this court, did at first give forth an uncertain sound and its voice did seem uncertain and confused, on the question of the right of the insurer to an injunction to stay suits against his insured. Because of this, courts and law writers,[18] failing to catch their real significance, have sometimes incorrectly construed these cases and their effect.

Later decisions have clarified our position, and our court, on this as well as on many other matters in declaratory judgment insurance litigation, has spoken with authority and finality.

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[11]Aetna Life Ins. Co. v. Haworth, 84 F. (2d) 695 (C. C. A. 8th, 1936) *rev'd* 300 U. S. 227, 57 Sup. Ct. 461, 81 L. ed. 617 (1937); Columbia Nat. Life Ins. Co. v. Foulke, 89 F. (2d) 261 (C. C. A. 8th, 1937).

[12]Ohio Casualty Ins. Co. v. Plummer, 13 F. Supp. 169 (S. D. Tex. 1935).

[13]Interstate Natural Gas Co. v. Gully, 8 F. Supp. 174 (S. D. Miss. 1934).

[14]Gully v. Interstate Natural Gas Co., 82 F. (2d) 145 (C. C. A. 5th, 1936).

[15]Mississippi Power & Light Co. v. City of Jackson, 116 F. (2d) 924 (C. C. A. 5th, 1941).

[16]91 F. (2d) 607 (C. C. A. 5th, 1937).

[17]92 F. (2d) 895 (C. C. A. 5th, 1937).

[18]Appleman, in his articles in 1939 Wis. L. Rev. 496, and (1940) 29 Ky. L. J. 48, cited *supra* n. 4, strikes some stout blows for the issuance of an injunction. In his *Wisconsin Law Review* article he leans heavily on the *Caswell* case, pays the *Edmonson* case very little mind and gives Central Surety & Ins. Corp. v. Norris, 103 F. (2d) 116 (C. C. A. 5th, 1939), which clearly points out the meaning and effect of the *Caswell* case, merely a "but see." By no means surrendering the point which I think is already settled against him, he begins his article in the *Kentucky Law Journal* with the most serious questions still unsettled in connection with declaratory judgment cases, to wit: the right of one forum in which the declaratory judgment suit is present to enjoin the commencement or the prosecutions of actions in other courts. He again puts forward the *Caswell* case, and leans heavily on it. This time he gives the *Norris* case a little more attention, but by accepting it as containing this reasoning, and rejecting it as more academic than practical, he sticks to an insistence that an injunction ought to, and perhaps will, lie. He concludes his argument: "I think the federal decisions show clearly that injunctions will be issued where the federal court first obtains jurisdiction of the parties despite the difference in subject matter, pending suits they have usually refused to touch."

Having in *Gully v. Interstate Natural Gas Co.*[19] struck a solid blow for the use of the device, we were called upon in the *Caswell* case,[20] by the insurer of an automobile liability insurance policy upon allegations of collusion between the insured and claimants, to determine whether plaintiff could have a declaratory judgment as to the coverage, and therefore as to its liability *vel non* under its policy. Holding that the case presented by the pleadings came within the letter and intent of the statute, we reversed a judgment which had dismissed the bill, and because, and only because, of the special equities raised upon the allegations of collusion, which were not denied, we ordered that a temporary injunction issue. The court did not hold, as the case has been sometimes cited as doing, that an injunction could issue against the prosecution of suits already filed, for none had been filed. Nor did it hold that the special equities of that case aside, an injunction would have properly issued against the filing of suits.

A few months later, in the *Edmonson case,*[21] this court, in holding that the pendency of another suit between the insurer and the insured did not deprive the court of jurisdiction to entertain the declaratory judgment, again reversed a judgment dismissing an insurer's petition for declaratory judgment.

Affirming the personal nature of the declaratory judgment suit, this court decided: (1) that the fact that a decision in the state court if finally reached before the case in the federal court is decided may settle the matter, is no ground for declining to take jurisdiction; (2) that both the suit in the state court and the suit for declaratory judgment in the federal court were suits *in personam;* and (3) that both might proceed until one of them is so decided as to dispose completely of the issues for decision in the other court. As some courts had misinterpreted the *Caswell* case as authorizing an injunction *pendente lite* in any cases where a declaratory judgment suit was filed, so some courts and text writers[22] have misinterpreted the *Edmonson* case, as holding that the court had no discretion in granting or refusing declaratory judgment relief.

Just as the *Caswell* case was intended to hold and did hold only that under the peculiar facts of that case a temporary injunction might issue, so the *Edmonson* case was intended to hold and did hold merely that the pendency of another suit was not a ground, as the district court had

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[19]82 F. (2d) 145 (C. C. A. 5th, 1936), *supra* n. 14.

[20]Central Surety & Ins. Corp. v. Caswell, 91 F. (2d) 607 (C. C. A. 5th, 1937), *supra* n. 16.

[21]Carpenter v. Edmondson, 92 F. (2d) 895 (C. C. A. 5th, 1937), *supra* n. 17.

[22]*Cf.* 16 AM. JUR., DECLARATORY JUDGMENTS 273, 489; Notes (1942) 51 YALE L. J. 511, 514, (1933) 87 A. L. R. 1201.

thought, for dismissing the declaratory judgment suit for want of jurisdiction, for both suits being *in personam,* both suits could proceed.

As in the *Caswell* case the general right to a declaratory judgment was not the issue, so in the *Edmonson* case, the question of discretion to grant or refuse relief was not in issue. In the *Caswell* case, the real matter at issue was the propriety of maintaining the declaratory judgment suit. The question of the temporary injunction, if the suit was to be entertained, was merely collateral, and its issuance was not even opposed. In the *Edmonson* case there was no question of discretion as to granting or refusing the relief asked in the case, but only of obligatory jurisdiction over the suit, whatever might be done with it on the merits. There the state suit having been filed first no injunction was asked against it, but it necessarily followed from our holding that the two suits were *in personam* that the pendency of neither could form the basis of an injunction against the other.

It was not long, however, before we flatly decided that an injunction should not issue[23] and that there was a discretion vested in the district judge as to the granting or the refusing of a declaratory judgment,[24] thus making our position clear both on the question of the issuance of an injunction and on the question of discretion in proceeding to judgment on the merits.

On the matter of injunction we said in Central Surety & Ins. Co. v. Norris:[25]

> "As to the suits already filed in the state court, the statute against enjoining such proceedings stands in the way. 28 U. S. C. A. 379; Maryland Casualty Company v. Consumers Finance Service, Inc., 3 Cir., 101 F. 2d 514 [1938]. The injunction of suits not yet filed which was ordered without indication of reasons in Central Surety & Ins. Corp. v. Caswell, supra, may have been based on the apparent collusion between the insured and the injured and their common purpose to mulct the insurance company. In Carpenter v. Edmonson, 5 Cir., 92 F. 2d 895 [1937], where the declaratory suit was much more closely identified with that pending elsewhere, we said both were suits in personam and both might proceed until one be decided when the decision could be used in a proper manner in disposing of the other. That we think should normally be the course taken in

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[23]Central Surety & Ins. Corp. v. Norris, 103 F. (2d) 116 (C. C. A. 5th, 1939); Ballard v. Mutual Life Ins. Co., 109 F. (2d) 388 (C. C. A. 5th, 1940).

[24]Columbia Casualty Co. v. Thomas, 101 F. (2d) 151 (C. C. A. 5th, 1939). *Cf.* Anderson v. Aetna Life Ins. Co., 89 F. (2d) 345 (C. C. A. 4th, 1937); Aetna Casualty & Surety Co. v. Quarles, 92 F. (2d) 321 (C. C. A. 4th, 1937); Aetna Casualty & Surety Co. v. Yeatts, 99 F. (2d) 665 (C. C. A. 4th, 1938).

[25]103 F. (2d) 116, 117 (C. C. A. 5th, 1939).

cases like that before us. See Kline v. Burke Const. Co. 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077 [1922]."

We thus made clear that in this circuit an injunction will not lie to restrain suits already pending and that since as we and other courts have held that these suits are *in personam,* an injunction will not lie to prevent the filing of other suits.[26]

In *Columbia Casualty Co. v. Thomas*[27] we affirmed a judgment of the district court which, in the exercise of its discretion, dismissed the suit without prejudice on the ground that the whole matter was already pending and in controversy in the state court and could be better settled there. It must be remembered, however, that the discretion here does not go to the question of the jurisdiction of the court but merely to the granting or refusal of relief, and that the federal courts have never decided that the mere pendency of a suit in a state court deprives the federal court of jurisdiction and requires a dismissal of the declaratory judgment suit for want of it. The contrary is well settled.[28] The true rule is that there is a discretion as to proceeding to judgment on the merits and that this discretion will be sustained unless it is abused.[29]

We have held that the insurer could make parties to its suit claimants against the insured for the purpose of determining questions of policy coverage, but both we and other courts have held that the insurer, on an ordinary indemnity policy, has no justiciable controversy with the claimants which entitles it to a declaration upon the question of the primary liability of its insured to claimants.

Where, however, the policy is not one of indemnity, but of direct liability to the claimant, as in public liability policies on public vehicles, there is strong ground for contending that the insurer could, in a suit joining both claimants and insured, seek a declaration both as to policy coverage and as to its liability under the policy.[30]

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[26]*Cf.* Ballard v. Mutual Life Ins. Co., 109 F. (2d) 388 (C. C. A. 5th, 1940). Though the question is still under discussion in some stubborn quarters, Anderson and Borchard regard it as settled against the injunction. Cases on both sides are cited in (1939) 52 HARV. L. REV. 527, 528. Appleman in his articles, *supra* n. 4, persists in insisting that the injunction should issue, at least as against the filing of suits.

[27]101 F. (2d) 151 (C. C. A. 5th, 1939).

[28]Ballard v. Mutual Life Ins. Co., 109 F. (2d) 388 (C. C. A. 5th, 1940); Western Supplies Co. v. Freeman, 109 F. (2d) 693 (C. C. A. 6th, 1940); Maryland Casualty Co. v. United Corp. of Mass., 111 F. (2d) 443 (C. C. A. 1st, 1940).

[29]*Cf.* Auto Mutual Indemnity v. Moore, 235 Ala. 426, 179 So. 368 (1938).

[30]*Cf.* United States Fidelity & Guaranty Co. v. Hearne, 233 Ala. 31, 170 So. 59 (1936).

The difficulty that presents itself in the way of a suit brought by one claimed against in tort, of conceiving a potential defendant as having a cause of action against a potential plaintiff, to determine whether or not he is liable, does not present itself as sharply here. While the action of the claimant springs because a tort has been committed, the claim is not in tort but on the contract of the insurer that he will pay the claimant for any injuries sustained by the tort of his insured.

It has not been difficult for the courts to apply the declaratory judgment procedure in cases where there is an insurance contract, and the question is as to its coverage, because this is in line with construction of wills and other documents, and to some extent, presents a familiar face to the courts. For this same reason, that it does present a rather familiar face, litigation of insurance contracts has offered an especially attractive field for the development of declaratory judgment law. The courts would, in my opinion, have had considerably greater difficulty in extending the procedure if it had been first invoked in pure tort actions. For these actions present the anomaly of a defendant suing a plaintiff not because of anything plaintiff had done to him but because of what he had done to plaintiff. I think there will still be difficulty, though not as much as formerly, in reconciling the courts to granting defendants declaratory judgment relief in a tort action.

Cases brought to obtain a declaration of non-liability under statutes, are not in point. They all proceed upon the equitable theory that the relief sought, a decree to prevent plaintiff from being proceeded against, is really affirmative and not negative relief.

On close analysis, however, I cannot see that there is really much ground to distinguish between a suit declaring no right in contract and one declaring no right in tort[31] and I would be inclined to say that where the suit is a full suit to determine and settle liability and not merely one to test the validity of a defense, or of a pleading, or of a part of a case, or

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[31]Borchard, in an excellent paper read at the meeting of the New York State Bar [Borchard, *Declaratory Judgments* (1939) 62 N. Y. STATE BAR ASS'N REP. 553] discusses very reasonably and persuasively the proposition that a petition praying for the so-called negative form of declaratory judgment—that the plaintiff is not under a duty to the defendant as in Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 57 Sup. Ct. 461, 81 L. ed. 617 (1937), and in cases where casualty companies claim that for lack of coverage they are under no duty to defend the insured—presents as truly an affirmative cause of action as does any action for damages.

The abuse just mentioned—the bringing of a suit and the dismissing of it—is not unique to patent cases. Tort claimants of all kinds have sought to harass defendants by bringing suit and then moving to discontinue. The courts should recognize that the defendants in such cases have a vital interest in the adjudication of the issue and should, by counterclaim, be permitted to keep the case in court should the plaintiff seek to withdraw.

to determine the enforceability of a judgment, or to do some one of those things which under the authorities it is now settled that declaratory judgment procedure cannot be made to do, any person who is likely to be sued may take the affirmative of the negative and obtain a declaratory judgment that he is not liable. This is not of course to say that I believe that an insurer may, merely because it cannot be held liable on its policy of indemnity until the insured is held liable to the claimant, obtain a declaration as to the insured's liability. For it has no legal controversy with its insured or with the claimant as to this. Its controversy with the claimant and with the insured is not in law as to whether insured is liable to claimant but whether if insured is liable, the insurer is also. However, the problem of settling all questions which arise in a suit for damages against an insured automobilist still remains. And there is much to be said for the proposition that the insured who has a controversy both with the claimant as to whether he is liable and with the insurer as to whether he has protection, could, under the liberal rules of joinder in the federal court, bring a declaratory judgment action to settle both issues in the same proceeding.

I do not believe that I have seen the report of such a suit. I know I have not seen any thorough discussion of the problem. I think I might well close this paper by saying that while there is much to be said in favor of such a comprehensive suit, since I have not seen any thorough discussion of the problem, I had better not attempt to answer it but leave its answer to the future and to you.

JURISDICTION AND VENUE OF TRANSITORY ACTIONS AGAINST NONRESIDENTS OF MISSISSIPPI

*J. M. Stevens, Jr.**

Modern conditions of business and transportation have created acute and perplexing problems of law relating to venue of action and service of process upon nonresidents. The marvelous development of rapid communication and transportation permits and encourages the transaction of business by means which, although not new, are so much easier and practicable than a few years ago, that all sort of business firms and organizations are engaging in business in various states in a manner and to an extent undreamed of before the advent of modern highways, automobiles, airplanes, air mail, telephone, etc. We are so accustomed to the far-flung business enterprises of many large interests that we accept them as everyday incidents of modern life, without stopping to consider their rapid development, and the fact that only a few years ago, their methods of doing business, and, in fact, their businesses, were much more restricted and localized than at present. Business firms of every description known to the law freely engage in contracting and construction, in merchandising, financing, transportation, public services and the business of public utilities, without regard to state lines. Individuals and partnerships transact extensive business enterprises in Mississippi without finding it necessary to come personally within the state, and in this manner to compete with large business corporations, the form of organization almost exclusively used heretofore for business of such character. Nonresident motorists of every description, from tourists to motor transportation lines, traverse the highways of the state over a new hard-surfaced system of highways, still so new that when we have occasion to travel by automobile, we rarely cease to wonder and remark at the ease and comfort of automobile traffic as we now enjoy it.

The construction of these highways, as well as their use, has been the occasion for the occurrence of many accidental injuries, giving rise to causes of action between residents and nonresidents, as well as between nonresidents and other nonresidents. The problems arising in connection with these actions are becoming more important and acute from year to year, and the preparedness program of the National Government, in the present emergency, will aggravate these conditions during the immediate years to come. The history and development of Mississippi is connected with routes of travel to a peculiar degree, for although the state has not

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become one of great business and industry, it lies across routes of travel which have been important from the earliest days. Recent tax laws are designed to discourage the closely held business corporations, so much so that the advantages of personal immunity are largely outweighed by the disadvantages and costs of maintaining such corporate structures. The problems of bringing nonresident individuals to trial in Mississippi, upon causes of action accruing in Mississippi, are immeasurably more complex and difficult than similar problems concerning corporations.

The purpose of this article is not to present an exhaustive treatise upon all considerations bearing upon the venue of actions against, and service of process upon, nonresidents, but instead is to point the direction which, in the opinion of the author, the legislative policy of the state must be turned; to direct attention to the constitutional limitations upon safe legislation upon the subject; and to point out the weaknesses and deficiencies of the laws we now have. It is the conviction of the author that not only Mississippi, but other states can revise their venue acts so as to provide a convenient forum for the trial of actions against nonresidents, without violating any of the protective principles of the constitution; and that, at least as to the majority of businesses conducted in the state by nonresidents, substituted process statutes can be so written as to comply with all contitutional limitations.

Venue of Transitory Actions Against Nonresidents

It is important to note that venue of actions in Mississippi has been intimately bound up with service of process. It is unnecessary to trace and analyze the development of our venue acts as they now exist, but it is helpful to point out that the principal requirement of venue is that the action be brought in the county in which the defendant or one of them may be found.[1] This discussion will not deal with special venue statutes which relate to transportation and utility companies, insurance companies, actions against executors and administrators, and the like, but instead will deal with the large class of defendants not specially provided for.

The general venue act was amended to provide that suits against domestic corporations might be brought in the county in which the corporation is domiciled, or in the county where the cause of action may occur or accrue. The conventional requirement that a defendant be sued in the county of his residence is provided by a personal privilege applicable only to a resident citizen who is sued in any action, not local, out of the county of his residence, and by giving such defendant the right to have

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[1]Miss Code Ann. (1930) § 495, relating to actions in Circuit Courts; Miss. Code Ann. (1930) § 363, relating to actions in Chancery Courts.

the action transferred to the county of his residence. This provision was later extended to public officers, and a special exception made in favor of public officers not accorded any other class of defendant, to-wit, that the right to such change of venue should not be denied because of the joinder of a co-defendant, found and served in the county in which the action is brought. It will thus be seen that usually the venue of a transitory action is as follows: The action should be brought—first, in the county in which a defendant may be found, subject to the privilege accorded a resident citizen and a public officer, to have a change of venue to the county of his residence;—second, if the defendant is a corporation, in the county where the corporation is domiciled, or in the county where the cause of action occurs or accrues.

In dealing with equal protection of the law as applied to venue statutes, the Supreme Court of Mississippi has rather clearly indicated that the classification of parties may not be upon too narrow lines, and that a classification favoring residents or nonresidents as between each other is unreasonable. In *Mississippi Power & Light Co. v. Lowe,*[2] the court, in holding that a public utility could be sued in any county in which its line extended, although the cause of action did not accrue or arise out of the performance of the public service which brought it within the venue act relating to such public utilities, observed that the statute applied equally as respects individuals and corporations, both domestic and foreign. In *Morrimac Veneer Co. v. McCalip,*[3] the court held that it is proper for the Legislature to classify corporations differently from individuals for purpose of venue, but in *Sanford v. Dixie Construction Co.,*[4] the court held that the venue of actions against foreign corporations was, and must be, the same as against domestic corporations, and that a classification which favored one as against the other would be contrary to the Fourteenth Amendment. In *Hercules Powder Co. v. Tyrone,*[5] as also in *Sanford v. Dixie Construction Co.,* the court held that for purposes of venue a foreign corporation will be deemed to have its place of business and domicile in Mississippi in the county where it maintains its principal place of business, or has its agent for service of process. In *Dean v. Brannon,*[6] the court emphasized that the venue statute does not provide that suit may be brought where one of the defendants may be domiciled or resides, but instead that suits should be brought where one or more of the defendants may be found. In the opinions in the *Hercules Powder Co.*

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[2]179 Miss. 377, 175 So. 196 (1937).
[3]129 Miss. 671, 92 So. 817 (1922).
[4]157 Miss. 626, 128 So. 887 (1930).
[5]155 Miss. 75, 124 So. 74 (1929).
[6]139 Miss. 312, 104 So. 173 (1925).

and *Sanford* cases the court cites and quotes from the opinion of the Supreme Court of the United States in *Power Manufacturing Co. v. Saunders.*[7] That case dealt with venue of actions against foreign corporations only, but has become an important landmark in the decisions relating to classifications of parties for purpose of venue. The Supreme Court of the United States struck down a statute of Arkansas authorizing suits to be brought against foreign corporations in any county of the state, although like suits could be brought against a domestic corporation only in the county where it had its chief place of business, or a place of business, or in which its chief officer resided.

The Supreme Court of Georgia, in *Lloyd Adams v. Liberty Mutual Ins. Co.,*[8] refused to follow the decision in *Power Manufacturing Co. v. Saunders,* on the ground that the Georgia venue act was based upon the defendant's residence, and that considerations of residence could not be applied to a nonresident. The court upheld a statute permitting suits against nonresident motorists, and foreign corporations not qualified to do business in the state, to be filed in any county in the state, although residents could only be sued in the county of their residence.

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[7]274 U. S. 490, 493, 47 Sup. Ct. 678, 679, 71 L. ed. 1165, 1168 (1927). The opinion of the court reads, in part, as follows: "The clause in the 14th Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws, and extends as well to corporate as to natural persons. It does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation. No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made. Here the separate classification of forign corporations is in respect of the venue or place of bringing transitory actions. The statutes mean foreign corporations doing business within the state by her permission and therefore having a fixed place of business therein and a resident agent on whom process may be served. We speak only of them. So far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals. Certainly there is no substantial difference. The opinion of the state court does not point to any relevant distinction, nor have counsel suggested any. Of course, the restricted venue as to domestic corporations and individuals is prompted by considerations of convenience and economy; but these considerations have equal application to foreign corporations. So far as the plaintiffs in such actions are affected, it is apparent that there is no more reason for a state-wide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary."

[8]190 Ga. 633, 10 S. E. (2d) 46, 49 (1940). The court said: "The act under attack provides for bringing suits against persons who have no residence in this state. Since the venue of tort actions against residents is based upon the residence

In *Windham v. Pace,*[9] the Supreme Court of South Carolina, following *Power Manufacturing Co. v. Saunders,* held unconstitutional that part of the statute permitting suits against a nonresident motor carrier in any county in the state, while actions against resident motor carriers or domestic corporations engaged in the business of motor carriers were required to be brought in a county through which the carrier operated.

The distinction made by the Georgia court in *Adams v. Liberty Mutual Insurance Co.* is doubtless sound, because considerations of venue relating to the residence of the defendant could not be applied to a nonresident, but it is difficult to understand the opinion of the Oklahoma court in *Wilson and Co. v. Hickey,*[10] where the court upheld a statute permitting suit against foreign corporations in the county of the residence of the plaintiff, although domestic corporations were suable only in the county where the corporation had a place of business, or in the county where its chief officer resided. The decision seems to give sanction to classification based upon residence alone, and this notwithstanding the fact that similar actions against domestic corporations were not based upon the same consideration.

In *Henry Fisher Packing Co. v. Mattox,*[11] the Kentucky court followed *Power Manufacturing Co. v. Saunders,* and held unconstitutional a statute which permitted the bringing of an action against a nonresident motorist in the county of the plaintiff's residence, or in the county in which the injury occurred, whereas a resident of the state could be sued only in the county where he resided, or in which the injury occurred.

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of the defendant, it is apparent that the venue of actions against nonresidents could not be determined on the same basis. The situation of the non-resident being distinctly different from that of the resident, it was proper for the General Assembly to classify them separately for the purpose of determining venue. The cases of Power Mfg. Co. v. Saunders and Henry Fisher Packing Co. v. Mattox, 262 Ky. 318, 90 S. W. (2d) 70, relied on by the plaintiff in error, are distinguished on their facts, in that the situation of the non-resident in each case was such that there was no reason why the venue of suits against it could not have been placed on the same basis as the venue of suits against residents."

[9]192 S. C. 271, 6 S. E. (2d) 270, 273 (1939). The court said, in part: "There is no real distinction, we think, between domestic and foreign motor carriers operating under the Act. Both engage in the same form of business; both make similar use of the highways in the state. The classification is clearly arbitrary. It is not based on a real and substantial difference having a reasonable relation to the subject of the particular legislation. The provision of the statute permitting suits to be maintained against foreign corporations in any county of the state, but limiting the place of trial of actions against individuals and domestic corporations to counties through which they operate, manifestly denies the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution. As was said in Power Mfg. Co. v. Saunders, 'There is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person, so far as the plaintiffs in such actions are affected.' "

[10]186 Okla. 324, 97 P. (2d) 564 (1939).

[11]262 Ky. 318, 90 S. W. (2d) 70 (1936).

By Chapter 246, Mississippi Laws 1940,[12] it is provided that suits against nonresidents for the recovery of damages might be commenced in the county in which the action accrued. This act has not been construed by the Supreme Court of Mississippi, and the only published opinion construing the act, so far as the writer knows, is the opinion of United States District Judge S. C. Mize in *Bouchillon v. Jordan*,[13] rendered on motion to dismiss because of lack of jurisdiction of the state court from which the suit was removed.

In this case, suit was instituted in the Circuit Court of Noxubee County against a nonresident motorist. Process was served upon the Secretary of State under chapters 148 and 345, Mississippi Laws 1938. The plaintiff contended that the venue was properly laid in Noxubee County under Chapter 246, Laws 1940, which was adopted after the cause of action accrued. The court held the act prospective and not retrospective, and that it did not apply to a suit arising before its approval, and sustained the motion to dismiss, but Judge Mize took occasion to

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[12]Section 1. Be it enacted by the Legislature of the State of Mississippi, That all civil actions for the recovery of damages brought against a non-resident of the state of Mississippi may be commenced in the county in which the action accrued. Service of process may be had in any county of the state where the defendant, or any of them, may be found.

Any non-resident, person, firm, partnership, general or limited, or any corporation not qualified under the constitution and laws of this state as to doing business herein, who shall do any business or perform any character of work or service in this state, shall, by the doing of such business or the performing of such work or services, be deemed to have appointed the secretary of state, or his succssor, or successors in office, to be the true and lawful attorney or agent of such non-resident, upon whom process may be served in any action, accrued or accruing from the doing of such business or the performing of such work or service, or as an incident thereto by any such nonresident, or his, their or its agent, servant or employee. The doing of such business or the engaging in any such work or service in this state shall be deemed a signification of such non-resident's agreement, and equivalent to an appointment by, such non-resident of the secretary of state of the state of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such non-resident upon whom may be served all lawful process in any action or proceeding against any such nonresident for any cause of action which has accrued or may accrue in this state.

Sec. 2. Service of any process herein provided for to be made upon the secretary of state shall be made by the sheriff of Hinds County, such sheriff to be entitled to the same fee for service of such process and return thereof as in other cases and shall be paid in advance before such sheriff shall be required to act. Two copies of any summons shall be served on the secretary of state, who shall preserve one copy as a record of his office and the other shall be mailed to the defendant. The summons shall show the address of the defendant. The clerk of the court in which the proceeding is filed shall immediately, upon the filing of the declaration or bill of complaint, send by registered mail, postage prepaid, a true copy of the same to the non-resident defendant. An affidavit of such mailing, together with the registry receipt, shall be filed with the court as a record in the case. The service of process as herein provided shall be of the same force and effect as if such non-resident had been personally served within the state of Mississippi.

[13]40 F. Supp. 354 (S. D. Miss. 1941).

express his opinion that the act is constitutional under authority of *Hess v. Pawloski,*[14] *Kane v. New Jersey,*[15] and *Hendrick v. Maryland.*[16]

If, as held by the Mississippi Supreme Court in *Sanford v. Dixie Construction Co.* a foreign corporation may be sued only in a county of the state where, in the same kind of an action and under similar facts, a domestic corporation could be sued, then it necessarily follows that a nonresident individual can only be sued in a county where, in a similar action, a resident individual could be sued. It would have been better if the act had provided that process might be served upon the agent in charge of the office of the nonresident defendant or in charge of his business out of which the cause of action accrued, because then the defendant, by his agent, would have been found in the ordinary case in the county where the cause of action arose. The Legislature was probably mindful, however, that many of the agents of nonresidents who conduct their affairs in the state are themselves nonresidents, who leave the state upon the completion of their business or work. In the opinion of the writer, the act would have been strengthened if the provision relating to venue had been omitted, and the remedy would be to amend the general venue provision to provide for the bringing of actions generally in the county in which the cause of action occurs or accrues, whether against residents or nonresidents.

A discrimination arises even between nonresidents under the Act, because only those who are sued for the recovery of damages may be sued in the county in which the cause of action occurs or accrues. All others must be sued in the county in which found. Thus, if a nonresident is sued in a tort action for the recovery of damages arising out of an accident in the performance of his work, under the Act he could be sued in the county in which the accident occurs, but if sued by a merchant of the same county for the price of goods purchased, he could only be sued in the county where found, that is, served with process, because the second action would not be one for the recovery of damages. Thus, a discrimination arises between one class of nonresidents and another, as well as between nonresidents and residents, and it is evident that under the authority of *Power Manufacturing Co. v. Saunders,* the Supreme Court would hold the classification to be arbitrary and unreasonable. The considerations prompting the limiting of actions against individuals to the county in which the defendant is found, would necessarily apply with like force between residents and nonresidents.

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[14]274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927).
[15]242 U. S. 160, 37 Sup. Ct. 30, 61 L. ed. 222 (1916).
[16]235 U. S. 610, 35 Sup. Ct. 140, 59 L. ed. 385 (1914).

In many states, venue is variously fixed in the county in which the cause of action occurs or accrues, the county of the residence of the defendant, or the county of the residence of the plaintiff. No such flexibility has ever existed in Mississippi, except as to corporations which may be sued in the county in which the cause of action occurs or accrues, or in the county where domiciled or where the principal place of business is maintained. Individuals must be sued in the county where found.

Many nonresident contractors and others establish places of business in Mississippi similar to the principal places of business of corporations, from which their affairs are conducted throughout the state. If process upon them could be served upon their manager or agent in charge of their business in the state, then unquestionably the same consideration for fixing the venue of actions in the county where found would apply as between residents and nonresidents. Under the Act in question, the nonresident finds himself served with process in the First District of Hinds County, the State Capitol, by service upon the Secretary of State, and thus has no choice as to venue of actions against him, regardless of where his business is conducted, if he insists upon his right to the pledge of the protection of equal laws.

Substituted Service of Process Upon Nonresident Individuals

The reluctance of the courts, led and guided by the Supreme Court of the United States, to sanction statutes authorizing the rendition of judgment *in personam* upon process not personally served upon the defendant, has made the subject somewhat controversial, especially in the minds of the editorial staffs and contributors to the various law reviews. The opinion of the Supreme Court in *Flexner v. Farson,*[17] decided January 7, 1919, became and still remains the target of criticism and controversy.

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[17]248 U. S. 289, 293, 39 Sup. Ct. 97, 63 L. ed. 250, 253 (1919). The opinion of the court, in part, reads as follows: "It is argued that the pleas tacitly admit that Washington Flexner was agent of the firms at the time of the transaction sued upon in Kentucky, and the Kentucky statute is construed as purporting to make him agent to receive service in suits arising out of the business done in that state. On this construction it is said that the defendants, by doing business in the state, consented to be bound by the service prescribed. The analogy of suits against insurance companies based upon such service is invoked. Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707. But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the states could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. Lafayette Ins. Co. v. French, 18 How. 404, 14 L. ed. 451. Pennsylvania F. Ins. Co. v. Gold Issue Min. & Mill. Co., 243 U. S. 93, 96, 61 L. ed. 610, 616, 37 Sup. Ct. Rep. 344. The state had no power to exclude the defendants, and on that ground, without going farther, the supreme court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void. If the Kentucky statute purports to have the effect attributed to it, it cannot have that effect in the present case. New York L. Ins. Co. v. Dunlevy, 241 U. S. 518, 522, 60 L. ed. 1140, 1143, 36 Sup. Ct. Rep. 613."

The Supreme Court had before it for construction a Kentucky statute providing for service of process upon nonresidents doing business in Kentucky by serving their agents in charge of their business. Judgment was obtained on such process in Kentucky, and suit filed on the judgment in Illinois: the Illinois court held the Kentucky statute to be unconstitutional, and the judgment rendered under it not entitled to full faith and credit. Mr. Justice Holmes' opinion is based squarely on the proposition that since the state could not exclude the nonresident individuals from doing business within its borders, it could not condition their right to do business.

The decision was promptly made the basis of an extensive article by Professor Scott in the *Harvard Law Review,*[18] which has been repeatedly cited, and followed by an array of similar articles, case notes and comments. An able and exhaustive comment was published in a recent issue of the *Mississippi Law Journal,*[19] discussing the provisions of Chapter 246, Mississippi Laws 1940, and a similar note on a similar statute enacted by the Legislature of New York in 1940 appears in the *Harvard Law Review.*[20] At present, we find ourselves with an impressive array of articles and comments supporting the constitutionality of statutes similar to Chapter 246, Mississippi Laws 1940, but fortunately or unfortunately, depending upon the point of view, no line of decisions has become established to support them. Since the publication of Professor Scott's article, however, the line of decisions regarding service of process on nonresident motorists and security dealers has become firmly established,[21] and in a recent opinion of the Supreme Court any lingering doubt as to the validity of substituted service on a resident individual of the state, but not found and served within the boundaries of the state, seems to have been removed.[22]

The reasoning which has largely induced the courts to adhere to a conservative policy has been a conviction that courts ought not to entertain jurisdiction of causes unless the situation of the defendant is such that the court has power to enforce its judgment and decrees.[23] In the leading

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[18]Scott, *Jurisdiction Over Nonresidents Doing Business Within a State* (1919) 32 HARV. L. REV. 871.

[19]Note (1941) 13 MISSISSIPPI LAW JOURNAL 559.

[20]Note (1940) 53 HARV. L. REV. 1061.

[21]Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927); Doherty and Co. v. Goodman, 294 U. S. 623, 55 Sup. Ct. 553, 79 L. ed. 1097 (1935).

[22]Milliken v. Meyer, 311 U. S. 457, 61 Sup. Ct. 339, 85 L. ed 278 (1940).

[23]Frequently quoted are judicial pronouncements along the following lines: "Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure." Michigan Trust Co. v. Ferry, 228 U. S. 346, 353, 33 Sup. Ct. 550, 57 L. ed. 867, 874 (1913).

"The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and

case of *Pennoyer v. Neff*,[24] the Supreme Court of the United States held that a personal judgment could not be rendered against a nonresident upon constructive service of process by publication. Strictly construed, the decision has never been modified, notwithstanding more recent decisions relating to substituted service of process. It is clear that as to nonresidents, there must be actual service of process personally within the state, on the nonresident defendant or on someone authorized by him to receive service of process upon him.

The decision in *Flexner v. Farson* has been distinguished on several grounds. First, and the only ground accepted by the Supreme Court, is the fact that the agent who was served with process was not at the time representing the defendant, and was no longer their agent, although he had represented the defendant at the time the cause of action accrued.[25] Second, the statute was not limited to suits occurring or accruing in the state and arising out of the business conducted by the nonresident in the state. Third, the statute applied only to nonresidents, and it would not be unreasonable to take the view that it discriminated as between residents and nonresidents. However, the problem appears to have impressed the courts as being one of due process, rather than one of equal protection of the law.

No particular method of service seems to be necessary to comply with the due process clause, and recent decisions of the Supreme Court seem

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although submission to the jurisdiction by appearance may take the place of service upon the person. [Citing the *Ferry* case] No doubt there may be some extension of the means of acquiring jurisdiction beyond service of appearance, but the foundation should be borne in mind. . . . And in states bound together by a constitution and subject to the 14th Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to the facts." McDonald v. Mabee, 243 U. S. 90, 91, 37 Sup. Ct. 343, 61 L. ed. 608, 609 (1917).

[24]95 U. S. 714, 720, 24 L. ed. 565, 568 (1877). Mr. Justice Field, in his opinion, said: "The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse."

It is interesting to note, however, that Mr. Justice Field foreshadowed methods now in general use for obtaining substituted service on nonresidents, as follows: "Neither do we mean to assert that a state may not require a nonresident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the nonresidents both within and without the state." 95 U. S. 714, 735, 24 L. ed. 565, 573 (1877).

[25]Doherty and Co. v. Goodman, 294 U. S. 623, 55 Sup Ct. 553, 79 L. ed. 1097 (1935).

to make it clear that due process is accorded a defendant when the statutory method of service "is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard."[26] Various methods of constructive and substituted service of process on resident defendants not personally found have long been familiar, and have generally been upheld when found to be reasonably sufficient to apprise the defendant of the bringing of the action, whether he receives actual notice or not.[27] While no particular form of service is required, no statute will meet the test of constitutional limitations unless it contains ample provision making it reasonably certain that the defendant will receive actual notice of the bringing of the suit, and an opportunity to appear and defend, and the statutory scheme is required to be the one best calculated to give the defendant actual notice.[28] Actual knowledge or notice to the defendant is unavailing, unless given in a manner authorized by the statute.[29] So far, the only fiction which the Supreme Court has sanctioned as the basis of subjecting a nonresident to substituted service of process is that of his consent to service, implied from the terms of state legislation so providing as a condition to operating a motor vehicle on the highways of the state, or engaging in some form of business peculiarly subject to the police

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[26]Milliken v. Meyer, 311 U. S. 457, 61 Sup. Ct. 339, 85 L. ed. 278 (1940).

[27]*See* Notes (1900) 50 L. R. A. 577, (1911) 35 L. R. A. (N. S.) 292, L. R. A. 1917C, 1143. See also Burdick, *Service as a Requirement of Due Process in Actions in Personam* (1922) 20 MICH. L. REV. 422, cited in Milliken v. Meyer.

[28]"To dispense with personal service, the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." McDonald v. Mabee, 243 U. S. 90, 92, 37 Sup. Ct. 343, 61 L. ed. 608, 610 (1917).

[29]"The question made in the present case is whether a statute, making the Secretary of State the person to receive the process, must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the Secretary will be communicated to the nonresident defendant who is sued. . . . The enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer of the plaintiff is required to mail the notice to the defendant or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice.

"Every statute of this kind, therefore, should require the plaintiff bringing the suit to show in the summons to be served the postoffice address or residence of the defendant being sued, and should impose either on the plaintiff himself or upon the official receiving service or some other, the duty of communication by mail or otherwise with the defendant.

"These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here.

"But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute it can not, therefore, supply constitutional validity to the statute or to service under it." Wuchter v. Pizzuti, 276 U. S. 13, 18, 48 Sup. Ct. 259, 260, 72 L. ed. 446, 449 (1928).

power of the state.[30] In *Hess v. Pawloski* the Supreme Court was careful to review and reaffirm the constitutional limitations on the exercise of jurisdiction by the courts of the several states over nonresidents.[31]

The case of *Davidson v. Doherty and Co.*[32] presents every argument in favor of the validity of such statutes. The act before the court applied alike to residents, sued out of the county of their residence, and to nonresidents, and provided for service upon the agent or clerk employed in the office or agency. In other words, the effect of the act was to require consent to service on the actual agent or clerk of the defendant, rather than upon a state official. The opinion was published in American Law Reports, and followed by an unusually fine annotation,[33] quoting extensively from the law review articles. It is interesting to note, however, that in *Doherty and Co. v. Goodman,*[34] a different but similar case, the Supreme Court upheld the statute as applied to a securities dealer, intimating that under different circumstances, a different rule might obtain.[35]

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[30]*See* Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927), and other innumerable cases upholding service on nonresident motorists. See also Doherty and Co. v. Goodman, 294 U. S. 623, 55 Sup. Ct. 553, 79 L. ed. 1097 (1935).

[31]"The process of a court of one state cannot run into another and summon a party there domiciled to respond to proceedings against him. Notice sent outside the state to a nonresident is unavailing to give jurisdiction in an action against him personally for money recovery. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. There must be actual service within the state of notice upon him or upon some one authorized to accept service for him. Goldy v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559. A personal judgment rendered against a nonresident who has neither been served with process nor appeared in the suit is without validity. McDonald v. Mabee, 243 U. S. 90, 61 L. ed. 608, L. R. A. 1917F, 458, 37 Sup. Ct. Rep. 343. The mere transaction of business in a state by nonresident natural persons does not imply consent to be bound by the process of its courts. Flexner v. Farson, 248 U. S. 289, 63 L. ed. 250, 39 Sup. Ct. Rep. 97. The power of a state to exclude foreign corporations, although not absolute but qualified, is the ground on which such an implication is supported as to them. Pennsylvania F. Ins. Co. v. Gold Issue Min. Co. 243 U. S. 93, 96, 61 L. ed. 610, 616, 37 Sup. Ct. Rep. 344. But a state may not withhold from nonresident individuals the right of doing business therein. The privileges and immunities clause of the Constitution, Section 2, art. 4, safeguards to the citizens of one state the right 'to pass through or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise.' And it prohibits state legislation discriminating against citizens of other states. Corfield v. Coryell, 4 Wash. C. C. 371, 381, Fed. Cas. No. 3,230; Ward v. Maryland, 12 Wall. 418, 430, 20 L. ed. 449, 452; Paul v. Virginia, 8 Wall. 168, 180, 19 L. ed. 357, 360." Hess v. Pawloski, 274 U. S. 352, 355, 47 Sup. Ct. 632, 633, 71 L. ed. 1091, 1094 (1927).

[32]214 Iowa 739, 241 N. W. 700 (1932).

[33]*See* Note (1932) 91 A. L. R. 1327.

[34]294 U. S. 623, 55 Sup. Ct. 553, 79 L. ed. 1097 (1935).

[35]*Id.* at 627, 55 Sup. Ct. at 554, 79 L. ed. at 1099. The court said: "Iowa treats the business of dealing in corporate securities as exceptional and subjects it to special regulation. Laws 1913, c. 137; Laws 1921, c. 189; Laws 1929, c. 10, approved Mar. 19, 1929. The last cited Act requires registration and written consent for service of process upon the Secretary of State. See Merrick v. N. W. Halsey & Co., 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. 227. Doherty voluntarily established an office in Iowa and there carried on this business. Considering this fact, and accepting

It appears to the writer that the development of this branch of the law was and still remains accurately stated in the American Law Institute's *Restatement of Conflict of Laws.*[36] As indicated above, there does not appear to be any established line of decisions upholding the constitutionality of acts providing for service of process upon nonresidents generally, who do business within the state, without reference to the nature of the business conducted. The Iowa decisions are, of course, overshadowed by the Supreme Court's opinion in *Doherty and Co. v. Goodman,* and decisions of the Supreme Court of Kentucky prior to *Flexner v. Farson* were promptly conformed to that decision.[37] The Supreme Court of Pennsylvania in *Stoner v. Higginson,*[38] upheld a similar statute under a strong opinion, but its opinion, like that of the Supreme Court of Iowa, is overshadowed by *Dohcrty and Co. v. Goodman,* because the defendant was a securities dealer.

When Chapter 246, Laws of 1940, is compared with the practice in Mississippi respecting publication of process for nonresident defendants,

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the construction given to Section 11,079, we think to apply it as here proposed will not deprive him of any right guaranteed by the Federal Constitution.

"Flexner v. Farson, 248 U. S. 289, 63 L. ed. 250, 39 S. Ct. 97, much relied upon, does not sustain appellant's position. There the service was made upon one not then agent for the defendants; here the situation is different. King was manager of the appellant's office when the sale contract was made; also when process was served upon him. Moreover, under the laws of Iowa, neither her citizens nor non-residents could freely engage in the business of selling securities.

"The power of the states to impose terms upon non-residents, as to activities within their borders, recently has been much discussed. Hess v. Pawloski, 274 U. S. 352, 71 L. ed. 1091, 47 S. Ct. 632; Wuchter v. Pizzutti, 276 U. S. 13, 72 L. ed. 446, 48 S. Ct. 259, 57 A. L. R. 1230; Young v. Masci, 289 U. S. 253, 77 L. ed. 1158, 53 S. Ct. 599, 88 A. L. R. 170. Under these opinions it is established doctrine that a state may rightly direct that non-residents who operate automobiles on her highways shall be deemed to have appointed the Secretary of State as agent to accept service of process, provided there is some 'provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued.'

"So far as it affects appellant, the questioned statute goes no farther than the principle approved by those opinions permits. Only rights claimed upon the present record are determined. The limitations of Section 11,079 under different circumstances we do not consider."

[36]Section 84: "JURISDICTION OVER ONE WHO ACTS IN STATE. A state can exercise through its courts jurisdiction over an individual who has done an act within the state, as to a cause of action arising out of such act, if, by the law of the state at the time when the act was done, a person by doing the act subjected himself to the jurisdiction of the state as to such cause of action."

Section 85: "EFFECT OF CONSTITUTIONAL LIMITATIONS IN THE UNITED STATES. If a state cannot, without violating the Constitution of the United States, make the doing of certain kinds of acts within the State illegal unless and until the person doing the acts or causing them to be done has consented to the jurisdiction of the courts of the State as to causes of action arising out of such acts, the State cannot validly provide that the doing of the acts shall subject him to the jurisdiction of the courts of the State."

[37]*See* Andrews Bros. v. McClanahan, 220 Ky. 504, 295 S. W. 457 (1927).

[38]316 Pa. 481, 175 Atl. 527 (1934).

it falls far short of the safeguards with which the Bench and Bar of Mississippi are familiar. No manner or method of proof of the nonresidence of the defendant is required, nor is any particular form of proof, by affidavit or otherwise, required of the post office address and residence of the defendant. The act requires notice by registered mail, with the registry receipt to be filed, but under the regulations of the post office department, this is a receipt for the deposit of the registered item, and not the return receipt of the addressee. It seems to the writer that the act should require formal proof of the residence and address of the defendant, and also the defendant's return receipt for the registered notice to him of service of process upon his agent. In fairness to nonresidents, only a course of business which would usually be regarded as doing business in the state should result in bringing the statute into operation, and a single transaction or isolated piece of business should not result in an implied appointment of a process agent.

It also seems to the writer that Section 85 of the *Restatement of Conflicts* may be too strong a statement of the doctrine of *Hess v. Pawloski* and *Doherty and Co. v. Goodman.* It could hardly be said that the State, by legislative fiat, should be able to classify the business to be done as illegal unless consent of the nonresident proposing to engage in business is given, as there is undoubtedly a great variety of businesses which are subject to unusual governmental regulation. It would take a bolder lawyer than the writer to predict the limits upon the extension of the rule now in force as to nonresident motorists and securities dealers, but it would doubtless be reasonable for the state to extend the rule to all persons and firms contracting with the state for the performance of public work, to common carriers and persons engaged in public utilities or the transmission of intelligence, to businesses aided by the right of eminent domain, and to businesses which so affect the public health, morals or economic security as to fall within the term "affected with the public interest." It seems to the writer that the Supreme Court will protect jealously the right of individual citizens to engage freely in business throughout the several states, and that we may soon see a sharp tendency to restrict the erection by the states of barriers to trade and commerce.

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NOTES AND COMMENTS

The Necessity of Notice, Hearing, and Judicial Review of Licensing by Administrative Bodies

Introduction

At the outset of this note, the writer wishes to distinguish this subject from the general field of administrative law. Licensing regulation by administrative tribunals constitutes only a part of the whole of this new "fourth" branch of government. In its broadest sense the term "administrative law" includes all of the portion of law which concerns executive and administrative officials who act with executive, legislative and judicial powers.[1]

One important aspect of administrative law is the licensing of various trades, professions and businesses, referred to collectively in this article hereafter as "occupations." This administration through which there may be integrated regulation of the "occupations" is a preferred method of control in that it substitutes administrative supervision, which is continuous, for the case to case method of control under a system of legislative rules enforced by judicial action.

A license is, in its broad sense, a privilege to do that which would otherwise be unlawful. As such it is not a contract, neither property nor a property right,[2] nor a "vested" right.[3] With reference to "occupations," the term "license" denotes a right or permission granted by some competent authority to carry on a business or to do any act, which, without a license, it would be illegal to carry on or to do.[4] It is a formal permission to carry on some business or to do some act.[5] The term "license" involves several types of permission: first, the license which results from a license tax, a revenue measure; second, the regulatory license; third, a combination of the two set forth above; and fourth, those which arise from a registration or designation system such as those set up in the "National Securities Exchange Act"[6] and the "Grain Futures Act."[7]

If the requirement of a license is for revenue only, the issuance of the license is perfunctory.[8] There is a distinction between this first type and the second type in that in the former, for revenue, the license is withheld

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[1]Local Government Board v. Arlidge, [1915] A. C. 120, 84 L. J. K. B. 72.

[2]Martin v. State, 23 Neb. 371, 36 N. W. 554 (1888); Seaboard Air Line Ry. v. City of Raleigh, 242 U. S. 15, 37 Sup. Ct. 8, 61 L. ed. 121 (1917); Burgess v. Brockton, 235 Mass. 95, 126 N. E. 456 (1920).

[3]Laing v. Americus, 86 Ga. 756, 13 S. E. 107 (1891).

[4]Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23 (U. S. 1824).

[5]The right to license the "occupations" is found in the laws of Mississippi as early as 1824, and much earlier in the history of the common law.

[6]42 Stat. 881 (1934), 15 U. S. C. A. § 78 a-78jj (1934).

[7]42 Stat. 998 (1922), 7 U. S. C. A. §§ 1-7 (1926).

[8]This type of licensing may be found in the regulation of peddlers, dray-men, sellers of various commodities such as cigarettes, soft-drink dispensaries, stores and other businesses or conduct which may be subject to municipal regulation.

only until the payment of the tax, but where it is regulatory in its nature, it may be withheld because of personal qualifications, physical conditions or business practises which do not meet the requirements set forth by the statute or the administrative board.[9] Where there is a combination of the power to tax and the power to regulate, the basis of the license must first be determined by legislative action in order to arrive at a proper definition.

With these distinctions set forth, the paper is limited to a discussion of licensing which is, at least in part, of a regulatory nature with the accompanying effects and problems.

The common-law power to license is a necessary incident of the right of every sovereign to regulate, limited only by the form of government. The United States Supreme Court has laid down general principles that the right to regulate includes the right to license, where the license is a reasonable means for the accomplishment of the purpose of regulation. Decisions as to this inherent right are segregated into two classes: first, those which come within the police power of the state;[10] and second, those dealing with businesses "coupled with a public interest."[11] It is to be noted however that this latter classification is in reality a part of the former, but courts have nevertheless chosen to draw this fine distinction.

The most salutary exercise of the police power is that which seeks to forestall the advent of danger, not merely to avert its consequences. This is best attained by requiring the presence of certain personal qualifications or physical conditions as a prerequisite to the lawfulness of any action sought to be taken. The inquiry as to compliance with requirements is a task obviously unsuited to the legislature; while the function of the judiciary is properly limited to determining in cases and controversies whether any rule has been violated. The legislature has, therefore, often seen fit to delegate to administrative authorities the power to set forth the further requirements necessary to effectuate the general purposes declared by the statute and to ascertain in individual instances whether the requirements have been met, and if necessary, to take immediate action to avert or minimize the threatened or actual danger. The power to act in all these instances has been repeatedly sustained, in spite of the objection that it involves the exercise of judicial or legislative functions.[12]

Licensing statutes may be attacked on the ground that any such regulation of the "occupations" involved is unconstitutional. These statutes may be attacked on several grounds: first, that it is not within the police power to regulate such "occupations"; second, that such regulation collides with the due process clause of the federal or state constitutions; and lastly,

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[9]But the qualifications required by the statute, and, *a fortiori*, by the administrative body, must relate to the subject-matter demanding regulation.

[10]Crane v. Johnson, 242 U. S. 339, 37 Sup. Ct. 176, 61 L. ed. 348 (1917); Clark v. State, 169 Miss. 369, 152 So. 820 (1934).

[11]Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 1247 (1892); Tyson Bros. v. Banton, 273 U. S. 418, 47 Sup. Ct. 426, 71 L. ed. 718 (1927); Ribnick v. McBride, 277 U. S. 350, 48 Sup. Ct. 545, 72 L. ed. 913 (1928).

[12]Blue v. Beach, 155 Ind. 121, 56 N. E. 89 (1900); People v. Hasbrouck, 11 Utah 291, 39 Pac. 918 (1895).

that a person may not be deprived of engaging in any of the common occupations by such regulation.[13] Another objection may be that although a proper licensing statute would be valid, the particular statute in question is defective in one or more details. Such details may be lack of proper notice and hearing in case a license is revoked, or lack of statutory standards to guide the licensing board in granting or revoking licenses, and other similar problems.

In summarizing the general constitutional question, it may be said that where there is a power to regulate in the interest of safety, health, morals and public welfare, a license may be required in order to attain the desired regulation as long as the requirement bears some substantial relation to the accomplishment of the purpose,[14] and is not exercised in an arbitrary manner.[15] The question of constitutionality then becomes one of boundary between the police power and the due process limitation of the various constitutions.[16] In this connection, however, it may be noted that the trend of the times is in the direction of the complete subordination of the individual to his government, that licensing is a part of the trend, and the courts cannot thwart this trend. Courts cannot hold back the inevitable, but they can do much to restrain the inroads on the liberty of the individual until it is proved that the inroads are inevitable. This must appear from conscious and continuous approval by the majority of the citizens.

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[13]It will be noted that the last is the more doubtful of the attacks on the statute's validity. Moreover, it will be noted that the grounds of the last two objections are overlapping one another.

[14]New State Ice Co. v. Leibmann, 285 U. S. 262, 52 Sup. Ct. 371, 76 L. ed. 747 (1932), sets forth the general principle stated in the text.

Judge Holmes in Noble State Bank v. Haskell, 219 U. S. 104, 119, 31 Sup. Ct. 186, 190, 55 L. ed. 112, 116 (1911), gives a more classic definition: "It may be said in a general way that the police power extends to all great public needs. . . . It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to public welfare."

With regard to the specific "occupations" regulated, the decisions have generally held the licensing statutes constitutionally sufficient:

Doctors—Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. ed. 623 (1899); State v. Turner, 102 Miss. 517, 59 So. 826 (1912).

Dentists—Douglas v. Noble, 261 U. S. 165, 43 Sup. Ct. 303, 67 L. ed. 590 (1923).

Optometrists—Price v. State, 168 Wis. 603, 171 N. W. 77 (1919).

Embalmers—Beard v. State Board of Embalmers and Funeral Directors, 111 Cal. App. 559, 295 Pac. 1052 (1931).

Barbers—Clark v. State, 169 Miss. 369, 152 So. 820 (1933); *Contra:* Schneider v. Duer, 170 Md. 326, 184 Atl. 914 (1936).

Architects—State Board of Examiners of Architects and Engineers v. Rodgers, 167 Tenn. 374, 69 S. W. (2d) 1093 (1934).

Accounting—*See* 21 MARQ. L. REV. 93 (1927) for a general statement of the problem.

Plumbers—*Contra:* Replogle v. City of Little Rock, 166 Ark. 617, 267 S. W. 353 (1924).

Paper Hangers—Dasch v. Jackson, 170 Md. 251, 183 Atl. 534 (1936).

Pool Halls—City of Corinth v. Crittenden, 94 Miss. 41, 47 So. 525 (1908).

[15]Yick Wo v. Hopkins, 118 U. S. 356, 68 Sup. Ct. 1064, 30 L. ed. 220 (1888), in which there is enunciated the rule that where there is the right to regulate, it must not be arbitrarily exercised.

[16]Liberty in its broad sense includes the right of every person to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any

I. *Right and Extent of Notice and Hearing upon Application For or Revocation of the License.*

As stated in the introduction, the subject matter of this note will be confined to consideration of licensing, or other governmental permission, as a device to regulate the "occupations." The trend is toward attempts by various trades, crafts, professions, and the like to obtain for themselves the benefits of the licensing statutes. It is therefore timely to examine the nature and extent of these various statutes sanctioning such activity. The list of "occupations" now within the yoke of administrative regulation is lengthening. The following are now subjected to licensing requirements: architects,[17] lawyers,[18] barbers,[19] dairies and creameries,[20] dentists,[21] embalmers,[22] factories,[23] engineers,[24] insurance companies,[25] nurses,[26] optometrists,[27] pharmacists,[28] physicians,[29] osteopahs,[30] accountants,[31] teachers,[32] and common carriers.[33]

The mode of acquisition, in general, is by request coupled with a promise to obey the particular act, and the rules and regulations promulgated thereunder, with the right to notice and opportunity for hearing in those instances where the license is refused or revoked. Revocation and suspension are usually provided for, and these actions are commonly preceded by notice and opportunity to be heard. Generally speaking, revocation or suspension may be for cause or by reason of criminal prosecution or conviction. It cannot be said that there is a general rule with respect to provision for the right to judicial review of the decisions of the administrator or administrative body charged with administering the licensing acts.

A. Issuance of the License

The various licensing acts set forth the procedure, varied in each instance either purposely or by purely haphazard legislation, through which

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lawful calling and to pursue any lawful trade or vocation. Butchers' Union v. Crescent City Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. ed. 585 (1884).

Compare, however, Vicksburg v. Mullane, 106 Miss. 199, 63 So. 412 (1913), which sets forth the view that while the right of every person to pursue a lawful business exists, it is subject to restrictive regulations which must be uniform in application.

[17]Miss. Code Ann. (1930) § 2617.
[18]Miss. Code Ann. (1930) § 3686.
[19]Miss. Code Ann. (1930) § 3848.
[20]Miss. Code Ann. (1930) § 4275.
[21]Miss. Code Ann. (1930) § 4294.
[22]Miss. Code Ann. (1930) § 4627.
[23]Miss. Code Ann. (1930) § 4642.
[24]Miss. Code Ann. (1930) § 4658.
[25]Miss. Code Ann. (1930) § 5135.
[26]Miss. Code Ann. (1930) § 5639.
[27]Miss Code Ann. (1930) § 5653.
[28]Miss. Code Ann. (1930) § 5825.
[29]Miss. Code Ann. (1930) § 5848.
[30]Miss. Code Ann. (1930) § 5861.
[31]Miss. Code Ann. (1930) § 5911.
[32]Miss. Code Ann. (1930) § 6603.
[33]Miss. Code Ann. (1930) § 7122. This list may appear to be quite large, but

the prospective licensee may obtain permission to engage in an otherwise prohibited "occupation." The method of application for examination before the administrative body, designated by the legislature to administer the act, is set forth in specific terms. This purely procedural matter is subject to strict compliance with the statutory requisites. In general the act confers on the administrative body the power to promulgate and make rules, regulations and set up standards for the administration of the act. The general standards or qualifications of the prospective licensee are enumerated in broad language by the statute. To the administrative body is left the task of establishing the minute details and features of those standards prescribed generally in the licensing acts. This determination of standards set forth as a condition precedent to the obtaining of a license, like the administrative selection of the subjects to be regulated, is open to judicial review.[33a] Yet it is to be remembered that, in exercising this review, the courts are chary of overruling the standards fixed by the administrative body.[34] Further, no objection can be raised to the validity of the standards by reason of their stringency or difficulty, if they are relative to the subject matter demanding regulation.[35]

In some instances the statutes do set forth a right of appeal or review, but there is more commonly silence on this point. The determination of the compliance with the requirements set up by the statute is primarily administrative and the courts will not conduct an original investigation, nor can there be judicial review of an administrative determination which has not been made.

Upon refusal to entertain an application, resort may be had to the various common-law remedies. *Mandamus* may be utilized to compel the board or commission to consider the applicant's qualifications.[36] Moreover, the license itself may be secured by *mandamus* when the officers withholding it are entrusted with mere ministerial duties.[37] Where, however, the denial of a license is based upon a finding of fact lawfully committed to the discretion of the licensing authority, *mandamus* is not available to substitute the discretion of the court for that of the administrative board.[38] Where the discretion is so wide that it may be exercised without announcing the reasons on which it is based, the administrative judgment seems necessarily free from judicial review. Allowance of judicial review would defeat the very purpose for which the broad discretion was given.

Certiorari has proven an even less effective remedy; not only because of the nature of the decision sought to be reviewed, but because if the granting of the license is purely ministerial, the writ of *certiorari* will not

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on the contrary it is small when compared to North Carolina's regulation of 56 occupations, including such occupations as dry cleaners, tile contractors, photographers, and dealers in scrap tobacco.

[33a]United States *ex rel.* Kerr v. Ross, 5 App. D. C. 241 (1895).

[34]United States *ex rel.* Smithson v. Ashford, 29 App. D. C. 350 (1907).

[35]Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. ed. 623 (1899).

[36]Florida *ex rel.* Lamson v. Baker, 25 Fla. 598 (1889); People *ex rel.* Ryan v. Wheeler, 3 How. Pr. (N. S.) 401, 2 N. Y. St. Rep. 656 (1886).

[37]People v. Busse, 231 Ill. 251, 83 N. E. 175 (1907); People *ex rel.* Danziger v. Metz, 123 App. Div. 269, 107 N. Y. Supp. 970 (1908).

[38]Illinois State Board of Architects v. People, 93 Ill. App. 436 (1900).

lie as such determination is not judicial in its nature.[39] However, where there is a provision for a notice and hearing prior to the revocation or suspension, which fact might determine whether the proceeding was judicial or ministerial in nature, the principle previously announced may not be applicable.[40] But if the act is said to be judicial in its nature, and yet discretionary, the writ will not lie because it would be contrary to the discretionary power to have it reviewed by way of appeal.[41]

B. Revocation

An effective licensing system requires not only a degree of care in the issuance of such permits, but also a satisfactory means of terminating such authority upon abuse thereof. Frequently, public welfare requires the summary revocation of a license, whereas in other situations notice and an opportunity to be heard must be given to the licensee. Unless there is a provision for summary revocation,[42] our statutes in Mississippi provide for notice and an opportunity to be heard. What circumstances or conditions are necessary for summary revocation are not quite clear and why notice and hearing are not necessary for the accordance of due process guaranteed by the constitution is not clearly settled. But there are certain principles that seem well-founded with regard to these particular problems.

On one proposition the courts agree: where a statute or ordinance authorizing the revocation of a license specifies notice and hearing to the licensee as a condition precedent to the exercise of the power, compliance with such condition is essential to a valid revocation.[42a] Where revocation requires a justifying cause,[43] the general rule is that it must be proceeded by notice and hearing, whether this is provided for by statute or not.[44] In this judicial contest, the licensee must show the injustice of the revocation, and while lack of notice may constitute injustice, it does not necessarily do so; the result is in any event that mere technical procedural defects cannot be relied upon to defeat revocation.[45] Courts, in a number of cases, in holding that such procedure without notice and hearing was invalid, said that this plainly did not constitute due process of law and

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[39]People *ex rel.* Lodes v. Department of Health of City of New York, 189 N. Y. 187, 82 N. E. 187 (1906).

[40]In some jurisdictions, such as Pennsylvania, Iowa and New Jersey, *certiorari* is employed to review administrative action not necessarily judicial in its nature, but this runs counter to the great weight of authority.

[41]Commissioners of Raleigh v. Kane, 47 N. C. 288 (1855).

[42]Ins. Companies—Miss. Code Ann. (1930) § 5135; Dairies and Creameries—Miss Code Ann. (1930) § 4275; Teachers—Miss. Code Ann. (1930) § 6603.

[42a]Beene v. State, 22 Ark. 149 (1860); Plummer v. Commonwealth, 1 Bush 26 (Ky. 1866); Tanguay v. State Board of Public Roads, 46 R. I. 134, 125 Atl. 293 (1924); Common Council of Oshkosh v. State, 59 Wis. 425, 18 N. W. 324 (1884).

[43]Licenses issued for the following occupations may, by statute, be revoked only for cause: dentists, barbers, nurses, optometrists, accountants, engineers and architects.

[44]People v. McCoy, 125 Ill. 289, 17 N. E. 786 (1888).

[45]People *ex rel.* Lodes v. Department of Health of City of New York, 189 N. Y. 187, 82 N. E. 187 (1906); People v. Wallace, 160 App. Div. 787, 145 N. Y. Supp. 1041 (1914).

for that reason the procedure was invalid.[46] In addition to the foregoing reasons, broad grounds of natural justice have led many courts to hold that notice and hearing were essential to valid revocation.[47]

In *Ex parte Heyfron,*[48] the court said: "It is a cardinal principle in the administration of justice that no man can be condemned or divested of his rights until he has had the opportunity of being heard."

Although the courts have fallen into singular disagreement as to the true nature of the right conferred by licensing statutes, if it may be said that a vested right has been disturbed by the revocation, it is clear that such revocation must be supported by notice and hearing in order that due process be afforded the licensee. On the other hand, if a license is treated as a mere privilege, revocation without notice and hearing is allowed by such courts.[49] Thus, it is seen that although the due process clause creates the necessity of notice and hearing, the courts have ample room to allow such summary revocation by saying that this does not deprive the licensee of any vested right, guaranteed protection by the due process clause. Furthermore, a hearing may be dispensed with in some situations where "tangible property rights" are not directly affected, but economic injury is threatened.[50] Other courts have chosen to settle the question by referring to this revocation procedure as being administrative in its nature and therefore permissible.[51]

It is sometimes held that the rights of the licensee are wholly dependend upon the terms of the statute, and if there is no provision for notice and hearing, either expressly or by fair implication, then the right to the license may be cut off by revocation without notice or hearing. The rights

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[46]Riley v. Wright, 151 Ga. 609, 107 S. E. 857 (1921); Jewell v. McCann, 95 Ohio St. 191, 116 N. E. 42 (1917); North Cedar Co. v. French, 131 Wash. 560, 230 Pac. 837 (1924). (These cases were based upon the notion that licenses constitute property or possibly liberty, within the meaning of the due process clauses.)

[47]Fletcher v. Dangerfield, 20 Cal. 427 (1862).

[48]How. 127 (Miss. 1843).

[49]Cases cited in Notes 2 and 3, *supra;* in addition Union Inst. for Savings v. Boston, 226 Mass. 286, 112 N. E. 637 (1916).

[50]Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. ed. 525 (1904); Bartlett Frazier Co. v. Hyde, 65 F. (2d) 350 (C. C. A. 7th, 1933).

Contra: Abrams v. Daugherty, 60 Cal. App. 297, 212 Pac. 942 (1922); Abrams v. Jones, 35 Idaho 532, 207 Pac. 774 (1922) (Dentists); and see People v. McCoy, 125 Ill. 289, 297, 17 N. E. 786, 788 (1888), where it was said: "Whether the right to practice medicine or law is in the technical sense, property, it is a valuable franchise and one which ought not to be deprived without being afforded an opportunity, by timely notice to defend it." (It will be noticed the occupations were generally useful to the public at large and substantially less capable of being conducted to the detriment of the public than those noted in note 49 *supra.*)

[51]People *ex rel.* Lodes v. Department of Health of City of New York, 189 N. Y. 187, 82 N. E. 187 (1906), went on the theory that the proceeding was administrative and that the license was, therefore, revocable without notice and hearing. This same idea appears in Klafter v. State Board of Examiners of Architects, 259 Ill. 161, 102 N. E. 193 (1913).

Contra: People v. McCoy, cited *supra* note 50; Bolling v. Board of Excise of City of Elizabeth, 79 N. J. L. 197, 74 Atl. 277 (1909); Wichita Electric Co. v. Kinckley, 131 S. W. 1192 (Tex. Civ. App. 1910). (The latter two cases describe the revocation of a license as penal in its effect and involving all the elements of a judicial proceeding.)

of the licensee can rise no higher than the terms of the statute or ordinance, by which he becomes the holder of the license.[52] *A fortiori,* it will be seen that where the statute provides for summary revocation, expressly or by implication, the licensee takes subject to this condition. Closely allied with this type of rationale are the cases that consolidate statutes which, in authorizing the issuance of "occupational" licenses, make a statutory violation by the licensee work an *ipso facto* revocation, or forfeiture of the licenses, or make a revocation by the licensing authority mandatory in such event.[53] The quantum of review to which the administrative action is subject furnishes but an ambiguous criterion for the ascertaining of the necessity of a hearing.[54] Yet where the statute expressly stipulates the procedure to be followed by administrative officers, they are ordinarily held to strict compliance with such procedure.

After the determination of whether a hearing is necessary or not, the next question is what does a hearing include? Common sense and justice are the predicates of the first general requirement, that of a hearing being practicable and reasonable in the particular case,[55] and yet afford interested persons an opportunity to be heard effectively.[56]

Historically and in practice, in our own country at least, a right to a hearing has generally included the right to the aid of counsel when desired and a sizeable number of state cases, containing abstract definitions of what constitutes a *fair hearing,* have reflected the view that a necessary ingredient of such a hearing is the right to be represented by counsel.[57]

It is doubtful that one would be justified in concluding that the retention of the oath in administrative proceedings is a constitutional requisite. The oath may be a useful device for inducing the witness to speak the truth, but its mere absence should not force the trier of fact to reject all unsworn testimony. Justice Sutherland observed in *Funk v. United States*[58] that "cross-examination, the increased intelligence of jurors, and perhaps other circumstances" have led to the abandonment of some of the exclusionary formulae of the common law; and similar considerations should support the legality of dispensing with the administration of oaths to witnesses in administrative proceedings. But even though administrative agencies could in all likelihood proceed without the formality of the oath, it is not clear as a matter of policy that they should do so. While it is

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[52]People *ex rel.* Lodes v. Department of Health of City of New York, 189 N. Y. 187, 82 N. E. 187 (1906); Child v. Bemus, 17 R. I. 230, 21 Atl. 539 (1891).

[53]Sprayberry v. Atlanta, 87 Ga. 120, 13 S. E. 197 (1891); Cassidy v. Macon, 133 Ga. 689, 66 S. E. 941 (1909); Martin v. State, 23 Neb. 371, 36 N. W. 554 (1888).

[54]Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 294, 53 Sup. Ct. 350, 77 L. ed. 796 (1933).

[55]Tomlinson v. Board of Equalization, 88 Tenn. 1, 12 S. W. 414 (1889).

[56]San Christina Inv. Co. v. San Francisco, 167 Cal. 762, 141 Pac. 384 (1914).

[57]People v. Nokomis Coal Co., 308 Ill. 45, 139 N. E. 41 (1923); People *ex rel.* Lons v. Whitney, 143 App. Div. 17, 177 N. Y. Supp. 554 (1911); Christy v. Kingfisher, 13 Okla. 585, 76 Pac. 135 (1904). The chief exception to this doctrine is to be found in the alien cases. United States *ex rel.* Wong Sai Chaan v. Comm'r of Immigration, 41 F. (2d) 526 (S. D. N. Y. 1931).

[58]290 U. S. 371, 380, 54 Sup. Ct. 212, 215, 78 L. ed. 369, 374 (1933).

difficult to prove, it is also difficult to disprove that a sense of responsibility impressed by oath is still decidedly better.

It cannot be asserted that failure to provide for compulsory process to procure testimony in administrative proceedings renders licensing statutes invalid. In Mo. *ex rel. Harwitz v. North,*[59] while it upholds the Missouri statute, seems to assume that if there were not some device for securing testimony, the procedure might be defective. But this reasoning, although followed by many courts, has been pointed out to be defective by Freund in his article "Due Process in the Revocation of Licenses."[60] There exists only one case, *Jewell v. McCann,*[61] in which the statutory creation of an administrative procedure was declared unconstitutional because of the absence of compulsory process. This case was criticized rather severely by Judge Burch in *Brinkly v. Hassig,*[62] in which he remarked: "With the exception of a sporadic case to be noted later, no court has ever declared that opportunity to present a defense and be heard in its support requires the adjective element of compulsory process."

Certain principles of procedure, such as the right to introduce written or oral testimony, or to cross-examine witnesses, are considered so fundamental by the courts as to be brought in certain instances within the concept of "due process of law."[63] But more often the *ratio decidendi* is based upon a general obligation in the administrative tribunal to grant a fair and impartial hearing.[64] In application of the doctrine it may be noted that a commission may. after a preliminary *ex parte* investigation, notify a person to appear and show cause why a particular order should not be made.[65] If he appears and contests the propriety of the order, the authorities will then be in a position to decide the matter on all of the

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[59]271 U. S. 40, 46 Sup. Ct. 384, 70 L. ed. 818 (1926).

[60](1927) 21 ILL. L. REV. 493. Freund says: "The decision belongs to that class of cases in which a statute is attacked for a supposed defect which the court finds does not exist . . ."; and further: "A saving circumstance will be found in the rule, so far as it is recognized, that a person cannot rely upon the constitutional defect by which he is not prejudiced. In a revocation proceeding, it will be rare indeed that a person charged has to rely for his defense upon the testimony of unwilling witnesses; normally it is the testimony on behalf of the state that may stand in need of compulsory process."

[61]95 Ohio St. 191, 116 N. E. 42 (1917).

[62]130 Kan. 874, 289 Pac. 64 (1930).

[63]Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. ed. 369 (1908); People *ex rel.* State and Queen's Gas Co. v. McCall, 245 U. S. 345, 38 Sup. Ct. 122, 62 L. ed. 337 (1917). The common law considers the cross-examination of an adverse witness so essential to the elucidation of the truth that in only a few situations does it permit testimony to be considered in evidence unless an opportunity may be had for cross-examination. Consequently, the courts regard the right to cross-examine at administrative hearings one to be guarded zealously, or even to be brought within the constitutional guaranty of due process. Farmers' Elevator Co. v. Chicago, R. I. & P. Ry., 266 Ill. 567, 107 N. E. 841 (1915).

[64]Interstate Commerce Commission v. L. & N. R. R., 277 U. S. 88, 38 Sup. Ct. 185, 57 L. ed. 431 (1913); New England Divisions Case, 261 U. S. 184, 43 Sup. Ct. 270, 67 L. ed. 605 (1923); Farmers' Elevator Co. v. Chicago, R. I. & P. Ry. Co., cited *supra* note 63.

[65]This type of action is provided for in majority of the Mississippi statutes.

information properly before them; if he fails to appear, he cannot thereafter complain of want of an opportunity to be heard.[66]

This particular criticism can be omitted in the case of the majority of our statutes in Mississippi. With the exception of those that provide for summary revocation of the licenses, the various acts provide for notice and hearing before revocation.[67]

II. *Right and Extent of Appeal and Review*

There is no general legislative custom to enact statutes which, as a matter of right, afford judicial review of the decisions of an administrative body. In the federal acts, Congress has proceeded on the theory that the courts will review those instances or cases where the administrative action is arbitrary or capricious and, therefore, Congress has made no general provision for judicial review. Mississippi licensing acts are just as haphazard in their provision for appellate review, or even the right of review. Some statutes are silent. Some provide for review by any court of competent jurisdiction, circuit court, chancery court, or even appeal to the Supreme Court.[68] In only one[69] of these statutes is the type or limit of review set forth.

The general rule has been that a statute is not unconstitutional as contravening "due process of law" because it does not expressly provide for a right of appeal to the courts from the decision of an administrative officer or body. At the basis of these decisions lies the fundamental principle, that an implied right of judicial review is always available, by bill in equity, *certiorari, mandamus,* or other appropriate proceedings by virtue of the general law.[70] Since the *Ju Toy* case [71] in America and the equally famous *Arlidge* case in England,[72] there has been considerable apprehension that administrative law is gradually encroaching upon a fundamental safeguard of liberty and property protected by the due process clause of the constitutions.[73] From inarticulate training or intuition, the average citizen has come to feel that the fundamental law of the land requires some sort of judicial review of those administrative determinations which seriously affect one's right with respect to liberty and property.

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[66]Cobb v. Downing, 278 U. S. 646, 49 Sup. Ct. 81, 73 L. ed. 559 (1928); Commonwealth v. Hall, 145 Mass. 195, 13 N. E. 486 (1887).

[67]Miss. Code Ann. (1930) §§ 3686, 3860, 4294, 4658, 3617, 5650, 5653, 5911, and 7122.

[68]Appeal to Supreme Court (Doctors and Osteopaths), Miss Code Ann. (1930) §5863; Appeal to Chancery Court (Dentists), Miss Code Ann. (1930) § 4323 with a slight discrepancy in the wording of the statute to be corrected; Appeal to the Circuit Court (Accountants), Miss. Code Ann. (1930) § 5916; Appeal to Court of Competent Jurisdiction (Architects and Common Carriers), Miss. Code Ann. (1930) §§ 3623 and 7125.

[69]Miss. Code Ann. (1930) § 5916.

[70]Hagar v. Reclamation District No. 108, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. ed. 569 (1884); American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. ed. 90 (1902); Ng Fung Ho v. White, 259 U. S. 276, 42 Sup. Ct. 492, 66 L. ed. 938 (1922).

[71]198 U. S. 253, 25 Sup. Ct. 644, 49 L. ed. 1040 (1905).

[72][1915] A. C. 120, 84 L. J. K. B. 72.

[73]These clauses are found in the 5th and 14th Amendments to the federal constitution, and Section 14 of the Mississippi Constitution of 1890.

The first case in point, *Chicago, Milwaukee and St. Paul Ry. v. Minnesota,*[74] held that due process requires a judicial review. Yet this case is not a good precedent for the general proposition that due process requires an independent judicial review of administrative determinations, for the modern commissions act after due notice and fair hearing; and in many respects, the proceedings are in a practical sense judicial proceedings. The courts in citing this case in support of their holdings have failed to give due consideration to this change.

Does the Constitution prohibit a wide margin of finality to the deliberate determinations of a body of specialists authorized by law to make such determination? In arriving at the answer to an important and fundamental question it is necessary to consider some of the fundamental conceptions underlying due process. In the first place, it must be remembered that due process is not necessarily judicial process;[75] that legislative, executive or administrative process may be due process; and that the right of appeal to a court is not in all cases an absolute essential of due process.[76] Furthermore, it must be remembered that the requirements of due process is not necessarily a requisite that justice be accomplished; it is primarily a requirement that the appropriate machinery be utilized for accomplishing justice[77] and a highly specialized commission is a more appropriate machine than a general court for determining the special questions within its limited jurisdiction. Finally, the due process clause, like the constitution of which it is a part, is, according to the better view, not a rigid, inelastic conception, but a living embodiment of supposedly fundamental principles which must always be applicable to the ever-changing conditions of society.[78] Can it not be said then that the trend of the time requires that due process in licensing regulations shall be a process in which there is due notice and fair hearing in a proceeding judicial in nature with a wide degree of finality?[79]

It seems expedient to sound a warning against too much generalization as to the tests whether or not administrative decisions are conclusive. We must note that the federal courts, chiefly the Supreme Court, have on the whole been careful not to bind themselves in the use of language to such an extent that review of administrative tribunals is impossible.

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[74]134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970 (1890).

[75]Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272, 15 L. ed. 372 (U. S. 1855); Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616 (1877); Reets v. Michigan, 188 U. S. 421, 23 Sup. Ct. 390, 47 L. ed. 563 (1903).

[76]Pittsburg, Cincinnati, C. & St. L. R. R. v. Backus, 154 U. S. 421, 44 Sup. Ct. 1114, 38 L. ed. 1031 (1894); and others cited *supra* note 75.

[77]Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616 (1877), in which it is stated: "It is not possible to hold a party has without due process, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

[78]For a general discussion see Hough, *Due Process of Law Today* (1919) 32 HARV. L. REV. 218.

[79]Such is the trend in administrative valuation for the purposes of condemnation, Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. ed. 1165 (1897); and for the purposes of taxation, Pittsburg, Cincinnati, C. & St. L. Ry. v. Backus, 154 U. S. 421, 44 Sup. Ct. 1114, 38 L. ed. 1031 (1894).

The fact that numerous controversies have been conclusively settled by administrative tribunals and its number continually on the increase is due largely to the fact that the courts consider judicial review unnecessary and inexpedient rather than the lack of the power to review. Despite this inability to generalize, and the danger which arises from attempts at generalization, it can safely be said that there are several trends and tendencies which will act as valuable guides to the solution of the question of the right and extent of judicial review.

There is a strong tendency on the part of the courts not to review findings of fact made by the administrative tribunals.[80] This is especially true where a competent agency has been established by law primarily to decide questions of fact; where knowledge of a special kind is required to pass upon such questions; and where the fact-finding body has adequate facilities for reaching the proper conclusions.

The courts are very reluctant to interfere where the problem involved is one for the discretion of the administrative officials or tribunals.[81] The courts make it a further practice not to review questions of policy, of wisdom, and expediency decided by the board.[82] In combining questions of fact with questions of discretion, the courts have in a number of cases, notably in the cases appealed from the Interstate Commerce Commission, characterized the series of questions as administrative in nature, and will generally refuse to review where the decisions are based upon the solution of such questions. As to mixed questions of law and fact, the courts generally adhere to the rule that where there is such a mixed question and the court cannot separate it so as to show the mistake of law, the decision of the tribunal to which the law has confided the matter is conclusive.[83] The consequence of a different rule would be that the courts would be flooded with appeals of this kind to review the decisions of administrative bodies in every instance.

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[80]United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. ed. 1040 (1905); Meeker v. Lehigh Valley R. R., 236 U. S. 412, 35 Sup. Ct. 328, 59 L. ed. 644 (1915); Seaboard Air Line Ry. v. United States, 254 U. S. 57, 41 Sup. Ct. 24, 65 L. ed. 129 (1920). However, the court will set aside the findings: (a) if there is a complete absence of supporting evidence on an essential point. Rowland v. Boyle, 244 U. S. 106, 37 Sup. Ct. 577, 61 L. ed. 1022 (1917); (b) if the evidence wholly points in an opposite direction. *In re* Dube, 226 Mass. 591, 116 N. E. 234 (1917); (c) if the result is such that it could not be reached, on the evidence, by fairminded men. San Diego Land and Town Co. v. Jasper, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. ed. 892 (1903); or (d) where the inference of the fact-finding body involves an obvious logical error. Florida East Coast Ry. v. United States, 234 U. S. 167, 34 Sup. Ct. 867, 58 L. ed. 1267 (1914); Northern Pacific Ry. v. Department of Public Works of Washington, 268 U. S. 39, 45 Sup. Ct. 412, 69 L. ed. 836 (1925).

[81]Miller v. United States, 233 U. S. 1, 34 Sup. Ct. 570, 58 L. ed. 823 (1914); Intermountain Rate Cases, 234 U. S. 476, 34 Sup. Ct. 986, 58 L. ed. 1408 (1914); New England Divisions Case, 261 U. S. 184, 43 Sup. Ct. 270, 67 L. ed. 605 (1923).

[82]Seaboard Air Line Ry. v. United States, 254 U. S. 47, 41 Sup. Ct. 24, 65 L. ed. 129 (1920); Interstate Commerce Commission v. Illinois Central R. R., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. ed. 280 (1910).

[83]Whitcomb v. White, 214 U. S. 15, 29 Sup. Ct. 599, 53 L. ed. 889 (1909); Ross v. Day, 232 U. S. 110, 34 Sup. Ct. 233, 58 L. ed. 528 (1914); Christie v. Great Northern Ry., 284 Fed. 702 (C. C. A. 9th, 1922).

The courts are ready to review an administrative decision where there has been an error of law and such error results, or is likely to result in the miscarriage of justice.[84] However, the opportunities for, or lack of, judicial review, depends largely upon the adequacy of the process, including the right of appeal that is provided within the administrative tribunal.[85] Adequacy of process raises the issue of reasonable opportunity for notice and fair hearing. If the process is adequate along these lines, it is clear that justice, or the rights under the due process clause, will not as a rule require judicial review in the nature of "appeal." Furthermore, where there is a hearing in first instance before an administrative body, no violation of due process occurs simply because that hearing is made final, where the provisions of the statutes are complied with, whether on questions of fact or law or both. On the other hand, if the process provided for is so inadequate as not to give even a semblance of due process, or if the process provided by law is denied, the courts will review the case and remand it, or give it a trial *de novo*.

Moreover, the Supreme Court of United States refuses to take jurisdiction on grounds of unconstitutionality of any case whether arising under the administrative law of the federal or state governments, until the complainant has exhausted the administrative remedies provided by law.[86] Further, there is the general proposition that an administrative body or tribunal should be confined to the exercise of the authority conferred upon it by statute. Since the authority of the administrative bodies depends largely or entirely on the statutes, their action in any proceeding must appear to be within the scope of the authority thus conferred.[87] Yet today this is the most disputed field of judicial review over administrative action.[88]

In arriving at the scope of review which will be exercised by the court in any particular instance of administrative action, account must be taken of several considerations. If a statutory appeal is used, one must of course take account of the precise language of the provision in the statute, if any, bearing upon the scope of review. Our legislature in its enactment of the various licensing acts has included the right of appeal from the revocation and suspension decisions of the various boards.[89] The courts vary in designation from the Supreme Court of the state to any court of competent jurisdiction. The appeal varies. A general statement of the right of appeal is set forth in some, but the appeal from the ac-

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[84]Weyerhaeuser v. Hoyt, 219 U. S. 380, 31 Sup. Ct. 300, 55 L. ed. 258 (1911); Florida East Coast Ry. v. United States, 234 U. S. 167, 34 Sup. Ct. 867, 58 L. ed. 1267 (1914); United States v. Pennsylvania R. R., 242 U. S. 208, 37 Sup. Ct. 95, 61 L. ed. 251 (1916); Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568, 43 Sup. Ct. 210, 67 L. ed. 408 (1923).

[85]Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272 (U. S. 1855); Bushnell v. Leland, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. ed. 598 (1897); United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. ed. 1040 (1905).

[86]Brainard v. Hubbard, 12 Wall. 1 (U. S. 1870); U. S. Navigation Co. v. Cunard S. S. Co., 284 U. S. 474, 52 Sup. Ct. 247, 76 L. ed 408 (1932).

[87]Noble v. Union River Logging R. R., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. ed. 123 (1903); Crowell v. Benson, 285 U. S. 22, 52 Sup. Ct. 285, 76 L. ed. 598 (1931).

[88]Landis, *Administrative Policies and the Courts* (1938) 47 YALE L. J. 519.

[89]MISS. CODE ANN. (1930) §§ 3623, 4323, 5863, 5916 and 7125.

countant's revocation is specified as a trial *de novo*. This type of haphazard legislation is certainly of no material aid in determining the scope of review from the language of the statute creating this right. Rather it lends itself to confusion and wastefulness. It leaves room for wide and variant interpretation by the courts. Since the administrative tribunal is, in a way, of questionable character in our constitutional system, as a consequence we have developed an elaborate doctrine of establishing a constitutional minimum below which judicial control of administrative action may not be pushed by statutory provisions. In the third place, the courts on numerous occasions seemingly have ignored the statutory provisions concerning judicial review, and have proceeded to develop their theories concerning this matter out of whole cloth.

Unfortunately, we have not many decisions which will give us sufficient insight into the problem to help us to determine in just what direction our highest tribunal will strike out. Yet we may rest assured that it will follow quite closely the principles laid down just previously, regarding the trend toward the finality of administrative decisions.[90]

There are two theories pursued by the courts when called upon to consider the validity of governmental action which impinges upon or interferes with property rights. If the action is judicial, that is, if in the form of a verdict and a judgment of a trial court, judicial review is limited to an investigation of the correctness of the trial court's action on the points of law, including the question of whether or not there was substantial evidence to support the verdict. Findings of the trier of fact are conclusive and the appellate court will not re-examine them even though the complaining party asserts that an incorrect finding of the facts is depriving him of his property unjustly. On the other hand, if the governmental action is by a legislative body, and if the question of confiscation is pleaded, the court will investigate the fact independently, that is the condition which prompted the passage of the law and the results which may be expected from its application. This procedure is necessary in order that the court may determine whether or not the legislative action was confined within the constitutional jurisdictional limits.[91] It would seem therefore that the ultimate solution of the problem as to the extent of the review which must be accorded depends on the question of whether the findings of fact of the administrative board will be treated as analagous to a jury decision or to legislative acts.

If the statute is silent on the right of appeal to a judicial tribunal, either purposely or inadvertently, the only recourse is to the common-law methods of securing judicial review. If this is done the scope of the review will be determined by the technical peculiarities of the method. *Mandamus* is designed to compel the performance of public officials of their public, ministerial duties.[92] As such it is issued within the exercise

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[90]For restatement of the general principles, see notes 80-89 *supra*.

[91]For full discussion of the subject see, Curtis, *Judicial Review of Commission* (1921) 34 HARV. L. REV. 862.

[92]MISS. CODE ANN. (1930) § 2348.

of the sound judicial discretion of the court,[93] and is not granted in cases of doubtful right. Where the act is discretionary in nature, the writ will not issue,[94] and the distinction between discretionary and ministerial duties is a fine and narrow one at times.[95] However, *mandamus* will issue in regard to use of discretionary power if it is used arbitrarily or palpably abusive of authority.[96] It is further said that mere absence of other remedy is not sufficient to compel its exercise by the court.[97]

The right to supervise judicial tribunals beneath it is said to be the inherent right of a superior court, and *certiorari* is the common law writ by which the corrective powers of the higher court are exercised.[98]

Yet *certiorari* is not limited to the review of inferior courts, for the acts of many administrative bodies may be controlled by the writ. The first question to be considered is whether the act is of a judicial nature or not. While it is difficult to draw the distinction between a judicial act and a ministerial or discretionary act, the technique of some courts in issuing the writ has been to term the acts as "quasi-judicial," and as such the acts were of such a nature as to allow the writ to issue.[99] It was held in England that *certiorari* would issue to examine proceedings of all jurisdictions and their action would be quashed if they proceeded to attempt to enlarge such jurisdiction. This rule has been adopted in our country also.[100] Thus, we have the basis of the rule that *certiorari* will not issue except to review questions of jurisdiction and illegality of action.[101] Yet courts have gone further in announcing that this writ would issue to review errors of law and those conclusions not supported by sufficient evidence.[102] It would seem that this writ should be of particular importance in the review of acts of administrative boards, where there is no means of appeal from the action of the board set out by statute.[103] The Iowa court, in the case of *Bremer County v. Walstead,* said:

> "Certiorari has several offices, among which is that of supplying defects of justice in cases obviously entitled to redress,

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[93]Duncan Townsite Co. v. Lane, 245 U. S. 308, 38 Sup. Ct. 99, 62 L. ed. 309 (1917).

[94]United States *ex rel.* River Side Oil Co. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. ed. 1074 (1903); Wilbur v. United States *ex rel.* Kadrie, 281 U. S. 206, 50 Sup. Ct. 320, 74 L. ed. 809 (1930); United States v. Wilbur, 287 U. S. 214, 51 Sup. Ct. 502, 75 L. ed. 1148 (1931).

[95]Decatur v. Paulding, 14 Pet. 497, 10 L. ed. 559 (U. S. 1840).

[96]United States *ex rel.* Roop v. Douglas, 8 Mackey 99 (D. C. 1890).

[97]Interstate Commerce Commission v. United States *ex rel.* Members of Waste Merchants' Ass'n, 260 U. S. 32, 43 Sup. Ct. 6, 67 L. ed. 112 (1922). And it never lies where there is an adequate remedy by appeal, United States v. District of Columbia, 61 F. (2d) 1015 (App. D. C. 1932).

[98]Rash v. Allen, 24 Del. 444, 76 Atl. 370 (1910); historical note in (1901) 51 A. L. R. 33.

[99]People v. Board of Health, 58 Hun 595, 12 N. Y. Supp. 561 (1891).

[100]Starr v. Rochester, 6 Wend. 564 (N. Y. 1831); State v. Frazier, 47 N. D. 314, 182 N. W. 545 (1921).

[101]Dolan's Appeal, 108 Pa. 564 (1885).

[102]Morewood v. Hollister, 6 N. Y. 309 (1852); State *ex rel.* Deart v. Wisconsin Highway Commission, 183 Wis. 614, 198 N. W. 753 (1924).

[103]Lloyd v. Ramsey, 192 Iowa 103, 183 N. W. 333 (1921).

> and yet unprovided for by the ordinary form of proceedings. It is especially applicable in the cases where inferior boards, officers, or tribunals exceed their authority, and no method of appeal has been provided by statute."[104]

Other remedies such as injunctive relief, habeas corpus, and the like have their limitations as prescribed by statute or historical application.

Conclusion

The great diversity in the provisions for judicial review in the statutes regulating various enterprises is the partial predicator of this article. The statutory provisions range from total silence on the subject of judicial review to trial *de novo*. There is no seeming justification for the purposeless diversities. Why should certain trades and professions, such as lawyers, embalmers, barbers and engineers, be denied the right of appeal to a superior court when it is granted to an occupation of similar dignity and utility such as doctors, accountants, architects and osteopaths? There appears no perceptible explanation and no visible policy which accounts for the difference in treatment. It might appear that these circumstances have arisen by reason of the passage of such legislation produced by the various pressure groups of the industry, trade or profession desiring this regulation. It might be argued that many varieties of provisions are experiments, but such a mass of differences as now exist are likely to obscure and confuse the results, muddling our experience as badly as the laws under which the experience is gained are muddled. It would be much wiser to frame a model form for a statute licensing the "occupations," and then to deviate from that form in statutes for particular "occupations" only when special conditions justify such deviations.

What would constitute the main points of this model form is not explainable in minute detail, but it may be generally said that they will regulate the "occupations" more uniformly rather than the sporadic manner in which they are now taken under control. The matter of licensing the ordinary "occupations" is a matter of policy, good or bad. At least, it is time for that choice to be made and then consistently followed. Licensing has had its trial period and time has come either to accept it as a good policy for the ordinary, garden-variety of "occupation" or to reject it as bad policy. And if accepted, it is time to apply it by a systematic extension to other occupations on the merits of each case.

The inclusion of the right to due notice and full hearing containing those elements as set forth in their treatment in the body of this note is not to be overlooked. On the contrary, the inclusion of those factors should have a definite bearing on the question of allowing judicial review. This right of review by a judicial body should be limited. If we are to allow judicial review of such administrative findings, then we will destroy the expediency and efficacy derived therefrom. With the complexity of this new life, the older conception of the supremacy of the doctrine of strict separation of powers must be cast aside. We must realize fully the existence and the necessity for the existence of this "fourth" field

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[104]130 Iowa 164, 106 N. W. 352 (1906).

of government. Further, we must realize that administrative process may just as well be due process rather than follow the stricter theory that there must be the interposition of courts and judicial sanction at every step of the determination by an administrative body.

Richard Everette Stratton, III.

RECENT DECISIONS

Quasi Contracts—Benefits Obtained Through Fraud—Effect of Intention to Confer Benefit Gratuitously

By fraudulent and false representations that he was a pauper, Lee induced the Old Men's Home to give him care and maintenance. Upon his death it was discovered that he had a bank account of more than $5,000 at the time he was admitted to the Home and continuously until his death. The Home now probates a claim for $1150.00 against Lee's estate. HELD: Recovery allowed. The law raises a quasi contractual obligation to pay for the services rendered him in order to prevent an unjust enrichment. *Old Men's Home, Inc. v. Lee's Estate,* 4 So. (2d) 235 (Miss. 1942).

True contracts are divided into the two main categories of express contracts and implied contracts. Quasi contracts may be distinguished from contracts implied in fact.[1] Often called contracts implied by law, quasi contracts are created by the law out of some duty or implied legal obligation.[2] They are created without respect to, and often contrary to, the intention of the parties.[3]

Quasi contracts include on the one hand, the obligation to pay a sum of money imposed by custom, statute, or record; and on the other hand the obligation imposed by law to make restitution in order to prevent unjust enrichment.[4] Since the famous decision of Lord Mansfield in *Moses v. Macferlan*[5] in 1760, the basis for the obligation in the second class has been well recognized.[6]

It is with those quasi contracts imposed by law to prevent unjust enrichment that we are concerned in this discussion. The inequitable retention of a benefit by the defendant is said to be the basis for this obligation which allows no one to

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[1] 1 Williston, Contracts (rev. ed. 1936) § 3.

[2] "Implied contracts universally recognized are divided into two classes; that is, contracts implied in law, commonly known as quasi or constructive contracts, and contracts implied in fact. Quasi contracts or contracts implied in law arise out of some duty or implied legal obligation." City of Pella v. Fowler, 215 Iowa 90, 244 N. W. 734, 737 (1932); see also Cascaden v. Magryta, 247 Mich. 137, 225 N. W. 510 (1929).

[3] *See* Stipp v. Doran, 18 F. (2d) 83 (1927); Zanes v. Lehigh Valley Transit Co., 41 F (2d) 552, 553 (1930); French v. Lewis and Clark Cty., 87 Mont. 448, 288 Pac. 455 (1930); *In re* Altmann's Will, 266 N. Y. Supp. 773, 149 Misc. 115 (Surr. Ct. 1933).

Plaintiff, trained nurse, performed services for deceased. Recovery against estate allowed, although there had been no written or oral contract between the parties. Bartlett v. Raidart, 107 Conn. 691, 142 Atl. 398 (1928).

[4] Corbin, *Quasi Contractual Obligations* (1921) 21 Yale L. J. 533; Woodward, The Law of Quasi Contracts (1913) § 3.

[5] 2 Burr. 1005, 97 Eng. Reports 676, 678 (1760). In this case Lord Mansfield said: "If the defendant be under an obligation from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were, upon a contract. . . . This kind of equitable action to recover back money, which ought not in justice to be kept, is very beneficial and therefore much encouraged."

[6] *See* Restatement, Restitution (1937) § 306 for a discussion of the development of the quasi contract doctrine.

After a study of the development of the theory of quasi contracts, the conclusion is reached that the test today is: "If it is reasonable in all the circumstances of the case that a contract should be implied, the courts will imply one." Note (1937) 53 L. Q. Rev. 447, 448.

enrich himself unjustly at the expense of another.[7] Any benefit, no matter what its form, which is obtained by fraud, constitutes an unjust enrichment, if it is retained. In following this doctrine, which is based on equitable principles,[8] stress should be on the principles and strict limitations announced with caution.[9] Indeed, from the very nature of the doctrine, the court must have a wide scope in which to do equity and administer justice.[10]

The evidence in the principal case clearly did not indicate an express contract between the parties. Neither can it be said that there was a contract implied in fact, for such was not the intention of the parties.[11] But the court found sufficient grounds to impose a contract implied in law—a constructive or quasi contract.[12]

The doctrine of quasi contract is one which has been long recognized by the Supreme Court of Mississippi.[13] The court has announced the well established rules

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[7]Ames, *The History of Assumpsit* (1888) 2 HARV. L. REV. 64; KEENER, QUASI CONTRACTS (1893) ch. 1; WOODWARD, THE LAW OF QUASI CONTRACTS (1913) § 6; Note (1929) 24 ILL. L. REV. 493.

See Porter Construction Co. v. Berry, 136 Ore. 80, 298 Pac. 179 (1931); Richland County Bank v. Joint School District No. 2 of Boaz, 213 Wis. 178, 250 N. W. 407 (1933); Dunnebacke Co. v. Pittman and Gilligan, 216 Wis. 305, 257 N. W. 30 (1934).

City accepted water from water company after franchise had expired. Held: city obligated to pay at established rates. Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 234, 91 N. W. 1081 (1902).

[8]"The essence of a quasi contractual obligation lies in the fact that the defendant has received a benefit which it would be inequitable for him to him to retain." McShane v. Quillin, 47 Idaho 542, 277 Pac. 554, 559 (1929).

Porter Construction Co. v. Berry, 136 Ore. 80, 298 Pac. 179 (1931), cited *supra* note 7; City of Pella v. Fowler, 215 Iowa 90, 244 N. W. 734 (1932), cited *supra* note 2.

"Although based on equitable principles, the doctrine of quasi contracts is enforced in actions at law." Horrabin Paving Co. v. City of Creston, 221 Iowa 1237, 262 N. W. 480, 482 (1935). This case was, however, heard in the chancery court, as an accounting was necessary. In the principal case the chancery court was sitting as a probate court to hear the claim against Lee's estate.

[9]"The detailed rules may be a straight-jacket if they are thought of as comprising the subject rather than as illustrating the main principle." Jackson, *The Restatement of Restitution* (1938) 10 MISSISSIPPI LAW JOURNAL 95, 102.

[10]"Perhaps in the wider currents of the law the purely moral drive has lost its force; but one must search deep in the law to come upon a field where the urge to find justice and do equity remains so articulate as in the law of quasi contracts." Cohen, *Change of Position in Quasi Contracts* (1932) 45 HARV. L. REV. 1333.

[11]A contract implied in fact must have been shown by the words or conduct of the parties. Cascaden v. Magryta, 247 Mich. 137, 225 N. W. 510 (1929), cited *supra* note 1.

[12]Judge Anderson in rendering this decision said: "The law denominates it as quasi or constructive contract. Such contracts rest upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." 4 So. (2d) 235, 236.

[13]"The distinction between an express and implied contract is, that in one the liability arises from the contract, and in the other the contract is implied or arises from liability." Musgrove v. City of Jackson, 59 Miss. 390 (1882).

Fowlkes v. Lee, 84 Miss. 509, 36 So. 1036 (1904); Buntyn v. National Mutual Building and Loan Ass'n, 86 Miss. 454, 38 So. 345 (1905); Gaulden v. Ramsey, 123 Miss. 1, 85 So. 190 (1920); Blodgett v. Pearl River Cty., 134 Miss. 816, 98 So. 227 (1923); De Soto Cty. v. Wood, 150 Miss. 432, 116 So. 738 (1928).

The promise to pay was implied by law in De Soto Cty. v. Wood, *supra*, after the services had been rendered by a public officer, and in Fowlkes v. Lee, *supra*, the promise was implied by law from the acceptance of the deed by the defendant.

in enforcing this type of obligation which is implied by law,[14] and the fact that there is no Mississippi case allowing recovery in essentially the same set of facts should not prevent the general principle from applying.[15]

A possible objection to recovery in the case at hand is the fact that the Home intended the services to be gratuitous at the time when they were rendered.[16] The general rule is that "where service or benefits are rendered as a gratuity because of a mistake as to a material fact,"[17] recovery will be allowed. Under those circumstances, the intention of the party that the services be rendered to the defendant gratuitously should not be controlling, for he was induced into that action under a mistake of fact.[18] This view was upheld by the court in the case of *In re Agnew's*

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[14]In Buntyn v. National Mutual Building and Loan Ass'n, 86 Miss. 454, 456, 38 So. 345 (1905), cited *supra* note 13, the court said: ". . . the liability . . . arises not from any express contract, either written or verbal, but from the fact that the appellee coerced the payment of money which it had no right to exact, in which case, because of its obligation to repay such money, the law implies a contract on its part to do so."

Plaintiff, under contract with defendant, rendered services as a nurse, for which he now seeks additional compensation. Court refused claim, finding no contract for additional pay. It was implied that recovery could have been allowed if there could have been found either an express or implied contract. Bell v. Oates, 97 Miss. 790, 53 So. 491 (1910).

In Hoyle v. Smith, 113 Miss. 729, 74 So. 611 (1917) the plaintiff probated claim against the estate of her sister whom she had cared for during the three years prior to her death. Court held that there could be no recovery in the absence of an implied contract to pay, pointing out that the presumption of gratuity was not rebutted.

Gaulden v. Ramsey, 123 Miss. 1, 85 So. 109 (1920), cited *supra* note 13, held that the claim for the value of the services should be allowed if it could be supported by either express or implied contract.

[15]"We have searched in vain for a case which holds that one may recover in an action for money had and received under circumstances similar to those here. Our failure to find such a case is not important if the plaintiff's claim can be upheld under established legal principles." Grad v. Neith Co-Operative Dairy Products Ass'n, 216 Wis. 519, 257 N. W. 618, 619 (1934). In this case plaintiff sold milk to defendant believing that he was a shareholder in defendant company, when in fact he was not.

[16]Woodward, The Law of Quasi Contracts (1913) § 46.

[17]Note (1937) 12 Notre Dame Lawyer 219.

Plaintiff contended in Standard Oil Co. v. Sugar Products Co., 160 La. 763, 107 So. 566 (1926) that recovery could be had for oil delivered through error. Finding that delivery was made under misrepresentation, court held that the defendant was clearly obligated to restore the oil.

In Miller v. Schloss, 218 N. Y. 400, 113 N. E. 337 (1916) the defendant owed the plaintiff a debt which he was unable to pay. Plaintiff owed one Hunt a sum which Hunt was demanding and which the defendant was directing plaintiff to pay Plaintiff paid the defendant the money due Hunt upon condition that defendant repay it in part cancellation of his indebtedness to plaintiff, and that Hunt's claim be taken care of by defendant. Hunt recovered in an action brought against plaintiff for the amount of such credit and plaintiff now sues defendant. No recovery allowed on basis of implied contract. Plaintiff acted voluntarily with full knowledge of the situation and there was not imposition, mistake, extortion, or oppression in the transaction.

[18]It was held in Boardman v. Ward, 40 Minn. 397, 42 N. W. 202 (1889) that where the plaintiff is induced to render valuable services for the defendant through fraud or the concealment of the true facts, he may recover for the services even though they were rendered gratuitously at the time.

In Sanders v. Ragan, 172 N. C. 612, 90 S. E. 777, L. R. A. 1917B 681, the plaintiff expected no pay for the services which she rendered for the man to whom she believed that she was legally married, but she was allowed to recover for she was in ignorance of the true facts of the case.

Will,[19] which has been widely discussed and has received favorable commendation from a number of sources.[20]

This general principle that a gift transaction can be rescinded and restitution granted because of a basic mistake has sometimes been held not to apply to the "pauper cases."[21] In those cases, recovery has been often denied,[22] but in finding no implied promise on the part of the pauper to pay, the courts have ignored the effect of mistake. Furthermore, in a majority of these cases, the courts have specifically pointed out that no fraudulent misrepresentations could be found.

In the instant case, the deceased induced the Home by his false and fraudulent misrepresentations to care for him. The Home was acting under a mistake of fact when the services were rendered for the alleged pauper. By his statements and by his concealment of the true facts, the deceased was guilty of fraud.[23] Because of those false and fraudulent misrepresentations upon which the Home acted, the intention that the services be rendered gratuitously should become immaterial and the Home allowed to recover.[24]

A second possible objection to recovery in this case may be found in the rule followed by some courts that where the enrichment is not in the form of money, the plaintiff can not waive the tort and bring assumpsit. This rule has been applied largely in the cases of wrongful taking of property; until the wrongdoer sells the property and receives the money, the plaintiff has not been allowed to recover in quasi contract.[25] The rule is now in a minority and is not sanctioned by the Restatement of Restitution. It has, however, made considerable impression on the

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[19]230 N. Y. Supp. 519, 132 Misc. 466 (Surr. Ct. 1928). Surgeons operated on the decedent, believing that he was a pauper, when in fact he was worth over $400,000. Doctors did not intend to charge for the operation but now sue his estate to recover. Court found that the decedent was not guilty of fraud as he was under a mistaken belief that he was entitled to charity, but held that the executors were still liable to the surgeons for the reasonable value of their services.

[20]For discussions of this case see Notes (1928) 42 Harv. L. Rev. 283, (1929) 9 B. U. L. Rev. 58, (1929) 14 Corn. L. Q. 239, (1929) 29 Col. L. Rev. 95, (1929) 24 Ill. L. Rev. 491, (1929) 6 N. Y. U. L. Q. Rev. 209, (1929) 7 Tenn. L. Rev. 327.

[21]Restatement, Restitution (1937) § 26

[22]Inhabitants of Stow v. Sawyer, 3 Allen 515 (Mass. 1862); Albany v. McNamara, 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212 (1889); Jones Cty. v. Norton, 91 Iowa 680, 60 N. W. 200 (1894); Montgomery Cty. v. Gupton, 139 Mo. 303, 39 S. W. 447, 40 S. W. 1094 (1897); Chariton Cty. v. Hartman, 190 Mo. 71, 88 S. W. 617 (1905); Hanrahan v. Baxter, 116 N. W. 595 (Iowa 1908). It is interesting to note that in a majority of these cases a town or a county is a party.

[23]Cooley, Torts (Throckmorton's ed. 1930) §§ 291, 292. Sovereign Camp, W. O. W. v. Boykin, 182 Miss. 605, 181 So. 742 (1938).

In Eggers v. Anderson, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570 (1901) a society cared for a woman who had a bank account more than sufficient to supply her needs, being so induced by her statements that she had no means of support. Recovery allowed on ground that the woman was guilty of fraudulent misrepresentations.

[24]Eggers v. Anderson, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570 (1901), cited *supra* note 23; Jones v. Stearns, 97 Vt. 37, 122 Atl. 116, 31 A. L. R. 533 (1923). In the *Jones* case, recovery was allowed against the estate of the deceased who had induced another to support her by fraudulent misrepresentations that she had no means of caring for herself.

"It seems that where an alleged pauper obtains charity by reason of misrepresentation or fraud he is liable. . . ." Note (1901) 55 L. R. A. 570, 576.

[25]Jones v. Hoar, 5 Pick. 285 (Mass. 1827). Plaintiff was held not to be able to waive the tort and sue in assumpsit unless the trees which had been cut and carried away had been sold by the defendant.

Mississippi Court.[26] That no reference is made to it in the instant case may be some indication that the court is abandoning this unsound restriction.

Another device for preventing unjust enrichment is that of a constructive trust. But in the instant case, that doctrine would be inapplicable. Generally, the enforcement of a constructive trust is a proceeding in equity to compel the defendant to surrender specific property.[27] In the principal case, there was no *res* to which the court could have attached a trust—no specific property which the plaintiff wished to recover. The Home is seeking only an amount of money from the estate which is equivalent to that spent in caring for Lee. For that recovery, the remedy at law is adequate.[28]

Evelyn Gandy.

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[26]Evans v. Miller, 58 Miss. 120, 38 Am. Rep. 313 (1880); Miller v. Wesson, 58 Miss. 831 (1881); Avery v. McClure, 94 Miss. 172, 47 So. 901, 22 L. R. A. (N. S.) 256; 19 Ann. Cas. 134 (1908).

[27]3 Scott, Trusts (1939) § 461.

[28]*Id.* at § 462.3.

PROGRAM
MISSISSIPPI STATE BAR
ANNUAL MEETING
JUNE 10-12, 1942

Wednesday, June 10

11:30 A.M.—Executive Committee Meeting, Junior Bar Section (Card Room, Buena Vista Hotel)

2:00 P.M.—Annual Meeting of Junior Bar Section (Sun Parlor)
J. M. Stevens, Jr., Jackson, Chairman, presiding
Report of Chairman of Junior Bar Section
Report of Committees:
Admission to the Bar, Charles Sisson, Clarksdale, Chairman
Legislative Committee, Maxwell Bramlette, Woodville, Chairman
Cooperation with Young Lawyers, Eugene Thompson, Marks, Chairman
Unethical Practice, Pat Holcomb, Clarksdale, Chairman
Encroachments on the Practice of Law, Lester Clark, Hattiesburg, Chairman
Public Relations, Leonard Nelson, Vicksburg, Chairman (In Military Service)
Cooperation with Junior Bar Conference of the A. B. A., Sherwood Wise, Jackson, Chairman (In Military Service)
Study Committee, David Cottrell, Jr., Gulfport, Chairman (In Military Service)
Code Committee, Nugent Shands, Jackson, Chairman, succeeding James A. Blalock, Jackson (In Military Service)

7:00 P.M.—Commissioners' Meeting, Mississippi State Bar (Card Room)

7:30 P.M.—Assembly of Junior Bar Section (Pavilion)
Completion of Committee Reports and Unfinished Business

8:00 P.M.—Address by Honorable W. G. Roberds, Associate Justice Supreme Court of Mississippi
Election of Officers, Junior Bar Section
Adjournment

8:30 P.M.—Meeting of Chancery, Circuit and County Judges

10:00 P.M.—Junior Bar Annual Dance (Buena Vista "Deck")

Thursday, June 11

Opening Session

Mississippi State Bar

(Buena Vista Pavilion)

9:30 A.M.—Call to Order, Alexander Currie, President

Presenting of Colors by Keesler Field Color Guard

Invocation, Rev. Henry T. Brookshire, First Baptist Church, Gulfport

Address of Welcome on Behalf of City of Biloxi, Mayor Louis Braun

Address of Welcome on Behalf of Harrison County Bar, W. Lee Guice, Biloxi

Response to Addresses of Welcome, Stokes V. Robertson, Jackson

10:15 A.M.—President's Address

10:35 A.M.—"Our Children in a World at War," Camille Kelley, Judge of Juvenile Court, Memphis

11:15 A.M.—"Property Rights and the Law of Oil and Gas," George A. Wilson, Chief Counsel of Standard Oil Co. of Louisiana, Shreveport

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12:30 P.M.—University, College, Fraternity and Other Group Luncheons

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2:00 P.M.—Committee Reports:

Coordination or Admission to the Bar, R. M. Kelly, Vicksburg, Chairman

Finance, Reece O. Bickerstaff, Gulfport, Chairman

Memorial, Stokes V. Robertson, Jackson, Chairman

Complaint Commissioner, Ben H. McFarland, Aberdeen

Study, George H. Ethridge, Jackson, Chairman

Legislative, Marion W. Reily, Meridian, Chairman

Annual Meeting at University, Jesse H. Graham, Meridian, Chairman

Law Journal, T. C. Kimbrough, University, Chairman

Public Relations, Quitman Ross, Laurel, Chairman

American Law Institute, Sidney Smith, Jackson, Chairman

Bill of Rights, W. S. Welch, Laurel, Chairman

Bureau of Identification, James M. Mars, Philadelphia, Chairman

Unauthorized Practice of Law, Chas. B. Snow, Jackson, Chairman
Americanism, F. C. Holmes, Hernando, Chairman
National Defense, Forrest G. Cooper, Indianola, Chairman

3:30 P.M.—"The Origin, Growth and Preservation of Democracy," Carl Marshall, Chairman

4:00 P.M.—"The Lawyer's Part in the Great Defense Problems of Today," T. C. Kimbrough, Dean University of Mississippi Law School

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8:00 P.M.—Annual Banquet (Main Dining Room)
Guest Speaker: Walter P. Armstrong, Memphis, President American Bar Association

10:00 P.M.—Annual Dance (Buena Vista "Deck")

Friday, June 12

8:00 A.M.—Past Presidents' Breakfast (Sun Parlor)

9:30 A.M.—General Assembly
Report of Junior Bar Section, J. M. Stevens, Jr., Jackson, Chairman

11:00 A.M.—"A Democracy Totally Mobilized to Win the War," Claude Pepper, United States Senator from Florida

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2:00 P.M.—Unfinished Business
Election of Officers
Election of State Bar Delegate to the House of Delegates of the American Bar Association
Selection of Next Place of Meeting
Introduction of New Officers
Adjournment

LADIES' ENTERTAINMENT

Wednesday, June 10

10:00 P.M.—Junior Bar Dance (Buena Vista "Deck")

Thursday, June 11

1:00 P.M.—Luncheon—Ladies' Auxiliary (Sun Parlor)

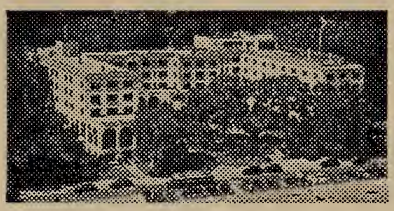
8:00 P.M.—Annual Banquet (Main Dining Room)

10:00 P.M.—Annual Dance (Buena Vista "Deck")

Friday, June 12

10:00 A.M.—Visit to Points of Interest on Coast

HEADQUARTERS FOR MISSISSIPPI LAWYERS



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